

1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF FLORIDA
 3 WEST PALM BEACH DIVISION
 4 CASE NO. 16-CV-80655-ROSENBERG

5 **JAMES TRACY,**

6 Plaintiff,

7 vs.

8 **FLORIDA ATLANTIC UNIVERSITY** . West Palm Beach, Florida
 9 **BOARD OF TRUSTEES,**

December 6, 2017

10 Defendant.

11 VOLUME 6

12 JURY TRIAL PROCEEDINGS
 13 BEFORE THE HONORABLE ROBIN L. ROSENBERG
 14 UNITED STATES DISTRICT JUDGE

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1 *THE COURT:* Good morning, everyone. I was told there
2 is no need to do a proffer. Is that true?

3 *MR. LEO:* Yes, ma'am.

4 *THE COURT:* I haven't looked on the docket, anything
5 filed with the revised --

6 *MR. FEICHT:* It has been finalized, just not filed.

7 *THE COURT:* When it is filed, let me know.

8 Dr. Coltman should come back on the stand. You are in
9 the midst of your direct examination, one hour and 54 minutes
10 into it. And all of our jurors are here.

11 Plaintiff, are you still planning on calling after Dr.
12 Coltman Joshua Glanzer?

13 *MR. LEO:* Yes. That is going to change, we are going
14 to keep it as short as possible. We are going to finish today
15 if possible

16 *THE COURT:* And Lisa Metcalf?

17 *MR. LEO:* We have a couple of professors coming in
18 this afternoon.

19 *THE COURT:* Who would come after Metcalf, McGetchin?

20 *MR. LEO:* One more, he may not be necessary once
21 Glanzer and whatnot, they are in the same office. And it would
22 be, I believe, Robe, McGetchin, Broadfield.

23 *THE COURT:* Rabil.

24 *MR. LEO:* We excused Rabil and we excused Wagner.

25 *THE COURT:* Eason.

1 MR. LEO: As well.

2 THE COURT: Broadfield.

3 MR. LEO: He is coming this afternoon. Bast isn't
4 coming. McGetchin this afternoon, and Robe.

5 THE COURT: You are not sure about Hull?

6 MR. LEO: Correct. He may be excused.

7 THE COURT: Okay. All right. So, let's -- how much
8 longer do you think you will be with Dr. Coltman?

9 MR. LEO: We will probably use the rest of our time.
10 I don't anticipate going longer than the time we allotted. We
11 have two hours, about.

12 THE COURT: Yes, 1:54 is what I have on my timer.

13 MR. LEO: I will try to keep it shorter.

14 THE COURT: Okay.

15 MR. LEO: Depends on the witness.

16 THE COURT: Okay.

17 *(Thereupon, the jury returned to the courtroom.)*

18 THE COURT: Welcome back, everybody, you may be
19 seated.

20 Dr. Coltman remains on the stand. You are still under
21 oath. We are on the direct examination of her. Counsel may
22 proceed.

23 **DIRECT EXAMINATION** continued.

24 BY MR. LEO:

25 Q. Good morning, Dr. Coltman.

1 A. Good morning.

2 Q. I would like to talk about the drop down box. You are
3 familiar with that box?

4 A. Yes.

5 Q. The one you said Professor Tracy refused to check?

6 A. Correct.

7 Q. Before you disciplined Professor Tracy on December 10,
8 2015, you knew he was emailing the supervisor, David Williams?

9 A. Yes.

10 Q. And before he was disciplined, you were sent all of the
11 emails between Dr. Tracy and Dr. Williams?

12 MR. CURLEY: Objection, calls for speculation, all the
13 emails.

14 THE COURT: Are you talking generally or particular --

15 MR. LEO: I can be more specific.

16 THE COURT: Yes. Just to remind our witness, as with
17 all of the witnesses, answer those questions you have personal
18 knowledge of and you can answer. We don't want you guessing or
19 speculating. It is okay to say I don't know if you don't know.

20 BY MR. LEO:

21 Q. You were sent the emails from Dr. Williams regarding the
22 check box, correct?

23 A. I did receive some emails, I don't know how many, from Dr.
24 Williams, yes.

25 Q. You received Dr. Tracy's emails, that is what you are

1 referring to?

2 A. The one he sent to Dr. Williams, I recall one. I don't
3 know if there were more.

4 Q. And you read them?

5 A. Yes.

6 Q. And you learned that there was some issue involving Dr.
7 Tracy's annual assignment, he was concerned about checking the
8 box, right?

9 A. Yes.

10 Q. Isn't it true in 2015, Dr. Tracy did not refuse to check
11 the box?

12 A. He checked the box the first time that he received his
13 original assignment in the summer. When his revised assignment
14 was given to him later on in the fall, he did not check the
15 box.

16 Q. Can we show Exhibit 33, please. Exhibit 33 is already in
17 evidence.

18 Did you see the email of November 2nd, 2015?

19 A. Yes.

20 Q. You see this was sent from David Williams to Professor
21 Tracy on November 2nd, right?

22 A. Yes.

23 Q. And it says here "I accept your pdf to the deans, but I am
24 not optimistic that it will be accepted."

25 Do you see that?

1 A. Yes, I do.

2 Q. You received the emails before November 2nd from David
3 Williams that are referenced here?

4 A. Probably, yes. I don't recall right now.

5 I know I received one, but I don't know when it was.

6 MR. LEO: Let's publish --

7 MR. MEDGEBOW: One second, I'm sorry.

8 MR. LEO: 31.

9 MR. MEDGEBOW: 31.

10 BY MR. LEO:

11 Q. I will show you what is marked as 31.

12 Didn't Professor Tracy say he would check the box if he got
13 clarification from the university?

14 A. Are we talking about the fourth complete paragraph.

15 Q. Yes. Do you see the monitor?

16 A. Yes. "I would be much more comfortable electronically
17 signing with these qualifications if the administration could
18 produce" -- blah, blah, yes.

19 Q. Professor Tracy would be comfortable concerning Professor
20 Tracy's personal activities "in no way constitute legitimate
21 intellectual/creative endeavors, and thus cannot be considered
22 conflict of interest, conflict of commitment or outside
23 activities," right?

24 A. That is what it says, yes.

25 Q. Dr. Tracy offered to check the box, right?

1 A. That is not what I would read specifically, no, but he does
2 indicate he would be more comfortable signing it.

3 Q. Right. He said he would be more comfortable checking it if
4 the administration could produce a statement, right?

5 A. Yes, that is what he says.

6 Q. At this time, he didn't say, I'm not going to check the
7 box; would you agree?

8 A. Correct, he does not write I will not check the box.

9 Q. So, he didn't refuse?

10 A. He does not say I refuse to sign the box, you are correct.

11 Q. And even though he hadn't checked the box yet, he did
12 resubmit his annual assignment electronically, didn't he? Do
13 you see the monitor there?

14 A. Yes. As the following paragraph shows, he did submit the
15 annual assignment as a pdf attachment.

16 Q. Could we go back to 33.

17 Going back to this right here. You got the pdf?

18 A. Correct.

19 Q. And Dr. Williams, at this point, indicated that he was
20 waiting to hear back from you; is that true?

21 A. Um-m-m, he says he is not optimistic it will be accepted.

22 MR. LEO: Go to 32-D. Let me show the witness what is
23 32-D for identification only. D as in dog.

24 THE COURT: Okay.

25

1 BY MR. LEO:

2 Q. Do you recognize Plaintiff's 32-D?

3 A. I see it, yes.

4 Q. This is an email exchange between you and Dr. Alperin?

5 A. Yes.

6 Q. And there is a communication to you. All the people
7 receiving this communication were doing so in the scope of
8 their employment at the university?

9 A. Yes.

10 MR. LEO: We offer 32-E.

11 THE COURT: Is it admitted without objection?

12 MR. LEO: D.

13 THE COURT: D.

14 MR. CURLEY: No objection.

15 THE COURT: Admitted, 32-D.

16 (Whereupon Plaintiff Exhibit 32-D was marked for evidence.)

17 BY MR. LEO:

18 Q. This is an email on November 2nd from David Williams?

19 A. Correct.

20 Q. He says, "Hi Linda/Heather, Jim is objecting to the
21 dropdown box. I have emailed him with the explanation provided
22 last week by Diane Alperin, but I am not optimistic that will
23 change anything. In the meantime, Jim sent a pdf of his
24 assignment - sans dropbox - that he has signed (attached). I
25 don't suppose we can do anything with that?"

1 Do you see that?

2 A. Yes, I do.

3 Q. Now, at this point, nobody from the administration had made
4 Dr. Tracy aware of whether or not this assignment would be
5 accepted; is that true?

6 A. He hadn't -- if he hadn't submitted it at this point.

7 Q. On November 2nd, you learned from Dr. Williams that Dr.
8 Tracy was not checking the box. Is that what this shows?

9 A. Yes.

10 Q. And you passed it up to Diane Alperin and Lawrence Glick.
11 That is the FAU lawyer, right?

12 A. Yes.

13 Q. But you didn't respond to Professor Tracy at that time?

14 A. Correct.

15 Q. And Dr. Alperin wanted to talk to you about it?

16 A. Yes.

17 Q. She said we need to discuss this. And you told her you
18 will call her the next day, right?

19 A. Yes.

20 Q. Did you call her the next day?

21 A. I am sure I did. I don't recall at this point exactly when
22 or which date I called her, but I am sure I did if I said I
23 would.

24 Q. Sometime before you disciplined Professor Tracy, you spoke
25 with her, right?

1 A. I probably did, yes.

2 Q. When you called, you spoke about the check box issue,
3 right?

4 A. To the best of my recollection, we would have done that,
5 yes.

6 Q. Scroll back down.

7 David Williams asked you, I don't suppose we can do
8 anything with that?

9 What did that mean?

10 A. I would imagine -- sorry, I am not supposed to imagine. I
11 think --

12 *THE COURT:* I'm sorry, if you don't know, we don't
13 want you to speculate.

14 If you can answer the question, you can answer it. If
15 you don't know, don't speculate or assume or imagine.

16 *THE WITNESS:* I don't know what he meant.

17 *BY MR. LEO:*

18 Q. He asked you that because at this time you were looking for
19 a way to discipline Dr. Tracy; isn't that true?

20 A. No, that is not true.

21 Q. You weren't exploring potential misconduct?

22 A. I wanted him to sign his assignment.

23 Q. He had already signed it.

24 A. He signed the original assignment back in the summer, he
25 did not sign the revised assignment.

1 Q. The one that was changed by administration?

2 A. I don't believe his assignment changed at all from the July
3 original assignment to the later assignment.

4 Q. Why would he need to sign it again?

5 A. The FAIR system need to go back in and accept their
6 assignment. If a change has been made, they need to recertify
7 that they have acknowledged the changed assignment. It is a
8 software system.

9 Q. What is the change?

10 A. Dr. Tracy would know that. I don't know. I don't believe
11 there were any changes to the assignment.

12 Q. He needed to check the box?

13 A. There are two boxes, the notification of the outside
14 activity forms, and following clicking that box, the person has
15 the opportunity to accept the assignment. So there are two
16 times where you can check okay.

17 MR. LEO: We'll publish 32-F at this time.

18 THE COURT: 32-F is in.

19 BY MR. LEO:

20 Q. If you could look at the monitor, this is 32-F. Do you see
21 the date on this one?

22 A. November 9th.

23 Q. David Williams is emailing Dr. Tracy and he says "your pdf
24 of your assignment was sent to the dean's office in A&L. They
25 in turn suggested a referral to legal. Legal referred it to

1 the Provost's office. I have not heard back from them. That
2 is the update."

3 By November 9th, a week later, do you agree?

4 A. A week later from November 2nd, yes.

5 Q. So, a week goes by and still David Williams has not heard
6 back from your office?

7 A. If we are looking at these emails, that sounds accurate, if
8 these are all of the emails that exist.

9 Q. And Dr. Williams is telling Dr. Tracy it is not clear that
10 Dr. Tracy's assignment would be accepted by the deans; isn't
11 that right?

12 A. He says he has not heard back from the Provost office or
13 legal or the dean's office.

14 Q. Had you talked to Dr. Alperin by this time?

15 A. I am sure I did.

16 Q. You don't remember what date it was?

17 A. No.

18 Q. So, by November 9th, you had not yet told Dr. Williams
19 whether Dr. Tracy's assignment without the accept box would be
20 accepted?

21 A. I don't recall if I had a meeting with David Williams or I
22 spoke with him on the phone. It was clear from what he was
23 sending us he did not have confidence the pdf would be accepted
24 in lieu of the signed signature box on the FAIR software
25 program.

1 Q. And you didn't tell him -- you didn't tell Dr. Williams
2 anything about it, whether or not it would be accepted?

3 A. He says he has not heard from us.

4 Q. Right. Would you agree this is not open, continuous
5 communications on an issue involving a faculty member?

6 A. I know these are emails, we may have had face-to-face
7 conversations or phone conversations of which there is no
8 record. I don't know if that is the case.

9 Q. Go to 35, please.

10 The next day you disciplined Dr. Tracy, right?

11 A. Yes.

12 Q. Isn't it true this is the first time that Dr. Tracy was
13 told that his assignment would not be accepted as submitted to
14 Dr. Williams?

15 A. I'm looking for a sentence that says that. Could you
16 scroll down?

17 Q. This is the first time you told Dr. Tracy that his
18 assignment would not be accepted by Dr. Williams?

19 A. It looks like this is the first time I told him it would
20 not be accepted.

21 Q. Isn't it true no one told Dr. Tracy the assignment would
22 not be accepted without the check box before you disciplined
23 him?

24 A. I believe that may be true.

25 Q. You never called in Dr. Tracy before November 10th, to work

1 it out, right?

2 A. Sorry, was that a question?

3 Q. Yes.

4 A. No, I did not call him in.

5 Q. Didn't you have an obligation to meet with him?

6 A. He works with his supervisor, he was working this out with
7 David Williams.

8 Q. He was working it out? He was trying to work it out,
9 right?

10 A. I don't know the full extent of their communications and
11 conversations. It looks like he had asked some questions of
12 Dr. Tracy.

13 Q. Without knowing the full extent of his communications with
14 his supervisor, you just discipline him?

15 A. You want -- I am sorry, I am not quite sure what question
16 you are asking. Yes, I sent him a discipline.

17 Q. Without knowing what is going on fully between Dr. Tracy
18 and his supervisor, you discipline him and you call it
19 insubordination, right?

20 A. Yes.

21 Q. Is insubordination Professor Tracy sending in his
22 assignment to the chair and waiting to hear from you? That is
23 insubordination?

24 A. According to this document, yes, I decided this constituted
25 insubordination.

1 Q. Let me go back here for a second. Let's talk about this
2 policy.

3 You tell Dr. Tracy all faculty are required to fill -- file
4 these records, right?

5 A. Yes, that is what it says.

6 Q. That is not FAU's policy, is it?

7 A. That is the policy as written here.

8 Q. I see how you wrote it, but as we discussed yesterday, not
9 all faculty are required to fill out these forms, are they?

10 A. Are we talking about the annual assignment or outside
11 activity forms?

12 Q. We are talking about the outside activity forms, right?

13 A. Right. Faculty who engage in outside activities are
14 required to file reports submitting a description of the
15 activities according to the CBA.

16 Q. Do you see this right here? (Indicating.) Within 48 hours
17 you are required to submit the report of outside
18 employment/activity forms for 2013-14, 2014-15, and 2015-16,
19 right?

20 A. Yes. That is what I wrote.

21 Q. Would you agree that is not the policy with respect to the
22 outside activity forms?

23 A. The policy is if you engage in outside activity, you are
24 required to fill out the forms.

25 Q. Right. So this is not true. I don't see here if you are

1 engaged in a reportable activity, it just says you are required
2 to submit a report of outside activity/employment form.

3 MR. CURLEY: Objection, cumulative.

4 THE COURT: Sustained.

5 BY MR. LEO:

6 Q. Is it true it does not say you are --

7 A. It is true.

8 Q. And it is true that not all faculty submit the reports,
9 right?

10 MR. CURLEY: Cumulative and repetitive.

11 THE COURT: It has been asked a couple of times,
12 sustained.

13 BY MR. LEO:

14 Q. You knew Professor Tracey was blogging?

15 A. Yes.

16 Q. You received complaints about Dr. Tracy's blog in 2015,
17 December; isn't that true?

18 A. I don't remember the dates, I need to see some
19 verification.

20 Q. Let me show you what is marked Plaintiff's 59 for
21 identification only.

22 Does that refresh your recollection about Dr. Tracy's
23 blogging and you receiving complaints?

24 A. Yes. This is dated December 26th, an email to Dr. Williams
25 from a member of the public.

1 Q. And it got forwarded to you?

2 A. Um-m-m -- I don't see -- yes, it was forwarded to me.

3 Q. And you forwarded it to Diane Alperin and Lawrence Glick?

4 A. Correct.

5 Q. Could we go back.

6 Wouldn't your directive have been clearer if you just told
7 Dr. Tracy the activity you knew about should be on the form if
8 that is what you wanted?

9 A. I was confident he knew that already.

10 Q. How, if you hadn't spoken with him?

11 A. Because he was very familiar with the policies and he was
12 very familiar with the issues that we had raised prior
13 regarding his blog. I was confident he was fully aware he was
14 required to do this.

15 MR. LEO: Your Honor, I move to strike the witness'
16 testimony, speculative.

17 THE COURT: Well, she is speaking about her views, I
18 was confident, but you asked the question. She said, because
19 he was very familiar with the policies and he was very familiar
20 with the issues that we had raised prior regarding his blog.

21 So that is a statement, and then, I was confident.

22 So, I won't strike her testimony, but I would simply
23 say, you know, make sure the questions are directed to that
24 which you believe the witness has firsthand knowledge of. If
25 you are not sure, preface the question with that question so

1 you know one way or the other before you get into a subsequent
2 question.

3 BY MR. LEO:

4 Q. You, a moment ago, testified you weren't aware of all of
5 the communications Dr. Tracy was having with his supervisor,
6 right?

7 A. I do know some of the emails, I don't know whether or not
8 there were additional communications.

9 Q. Your testimony is that you knew he knew the policy at that
10 time?

11 A. I said I was confident he knew the policy.

12 Q. Without speaking to him?

13 A. Correct.

14 Q. You didn't say what you wanted specifically in this notice
15 of discipline because you didn't want him to put the blog on
16 the form, did you?

17 A. I wanted him to report all of his outside activities
18 whatever they maybe, blog or others.

19 Q. Right. I am saying you didn't want him to put the blog on
20 the form, right?

21 A. If that was an outside activity, which I felt it was, I
22 wanted him to put it on the form. I wanted him to comply with
23 the requirements of all faculty.

24 Q. Why didn't you say you are required to report your blog on
25 a report of outside activity form?

1 A. I don't know why I didn't say that. There could have been
2 other activities he was engaged in that I wasn't aware of, I
3 simply wanted him to fill out the forms.

4 Q. You knew Professor Tracy thought his blog was not
5 reportable, right?

6 A. I don't know if I knew such a thing in November 2015.

7 Q. You do remember his letter in 2013, right?

8 A. Yes. He felt it was not reportable.

9 Q. So, in 2015, you knew that, right?

10 A. I knew that he felt that in 2013, yes.

11 Q. You knew that if you didn't mention the blog, he wouldn't
12 have reported it; isn't this true?

13 A. Could you repeat the question.

14 Q. If you didn't mention the blog in this letter of
15 discipline, he wouldn't have reported it, right?

16 A. I don't think I thought any of those things. I simply
17 wanted him to complete the requirements as all the faculty had
18 done so I could keep going with the year and keep the academic
19 mission of our college moving forward.

20 Q. You didn't want him to report the blog, did you?

21 MR. CURLEY: This is argumentative and cumulative at
22 this point.

23 THE COURT: Sustained.

24 BY MR. LEO:

25 Q. You set Professor Tracy up to fail, didn't you?

1 A. No, not at all, I wanted him to fill out the forms.

2 Q. You were offended by his blogging, weren't you?

3 A. What blogging do you mean?

4 Q. Professor Tracy's blogging.

5 A. No. I don't think I had --

6 Q. I am sorry, you can finish your answer.

7 A. Um-m-m, offended, no, I don't think I felt offended.

8 Q. You didn't like it?

9 A. I didn't necessarily agree with what he was saying, no.

10 Q. And that is why you investigated the complaints about
11 Professor Tracy's blogging in late 2015, isn't it?

12 A. Could you talk to me in more detail what you are referring
13 to?

14 Q. You were investigating Dr. Tracy in late 2015, weren't you?

15 A. Investigating in what way?

16 Q. You tell me.

17 A. I was aware he wasn't filling out forms and people in the
18 community were contacting us being unhappy about his comments.
19 Those are two different issues.

20 Q. You were investigating complaints about Dr. Tracy before he
21 was fired, right?

22 A. I am really not sure what you are talking about. I don't
23 see myself as an investigator. I am not sure what you mean by
24 that.

25 Q. I will show you what is marked 38-Q for identification

1 only.

2 You recognize this, don't you?

3 A. Yes, I do.

4 Q. You were investigating complaints from family, friends, the
5 Pozner family and friends, right?

6 A. Well, there is a series of emails here, how would you like
7 me to address them?

8 Q. Well, I want to ask you about your investigation.

9 A. So, I did receive an email from a person complaining about
10 his blog. She also said that Professor Tracy has been
11 harassing some of the families associated with Sandy Hook.

12 Q. Right, and you investigated that?

13 A. Yeah --

14 MR. CURLEY: I would like the witness to be able to
15 complete her answer without counsel interrupting.

16 THE COURT: Yes.

17 THE WITNESS: And I was concerned that she mentioned
18 he may be harassing somebody, and I felt I needed more
19 information on that. If a faculty member of my college were
20 harassing a member of the public, I needed to talk about that
21 to see if something could occur about the harassment.

22 BY MR. LEO:

23 Q. And what was the result of the investigation that Dr. Tracy
24 was harassing people?

25 A. I wrote an email back to the person.

1 Q. Let me ask another way.

2 Did you investigate the allegations made by the Pozners in
3 the *Sun Sentinel*, did you investigate those allegations?

4 A. Could you tell me which allegations you are talking about?

5 Q. Aren't those the same ones you were referring to,
6 allegations of harassment?

7 A. I was concerned that a member of the community indicated
8 that Dr. Tracy had been harassing some of the families in
9 Connecticut. So, when I was reached -- when somebody reached
10 out to me and made that claim, I wrote back and said could you
11 tell me more about this, because I wanted to find out if this
12 harassment was indeed occurring, and if it had, I wanted to be
13 able to discuss that with Dr. Alperin.

14 Q. And what was the result of the investigation?

15 A. Um-m-m, I received an email back after I emailed the person
16 who wrote me the email, the original email, saying she was
17 going to forward my contact information to the families who
18 were affected.

19 Q. And you --

20 A. And I don't believe I heard anything back beyond that.

21 Q. You heard nothing back from them, right?

22 A. Correct.

23 Q. And you received no evidence of harassment, did you?

24 A. Correct.

25 Q. Publish 36, please.

1 I will show you what is marked Plaintiff's 36. This is Dr.
2 Tracy's response to your Notice of Discipline dated
3 November 10; isn't that right?

4 A. Yes.

5 Q. You received this, right?

6 A. Yes.

7 Q. Certified mail?

8 A. Sorry, was that the question? Yes, I received it certified
9 mail.

10 Q. You sent it November 22nd, and he asked you, because of
11 time constraints, for a response no later than December 1st,
12 2015. Do you see that?

13 A. Yes, I do.

14 Q. So, when you read this, you knew Dr. Tracy was expecting a
15 response by December 1, right?

16 A. I know he requested a response. That response didn't fit
17 within the time frames I understood for grievances, so it
18 wasn't an expectation of his, he asked for it.

19 MR. LEO: Would you publish 37-W, please.

20 THE COURT: Which one are you referring to?

21 MR. LEO: 37-W.

22 THE COURT: A redacted version is in.

23 MR. LEO: Publish that, please.

24 BY MR. LEO:

25 Q. Dr. Tracy wanted a response on December 1st, and December

1 1st, instead of responding to Professor Tracy, you wrote Diane
2 Alperin; isn't that right?

3 A. Yes.

4 Q. You said he wanted a response by December 1st, oh well,
5 right?

6 A. That is what it says, yes.

7 Q. What does "oh well" mean?

8 A. I think it was my way of regretfully saying, well, he
9 wanted it by December 1st, oh well, we are late, it is December
10 1st right now. I guess we didn't get him what he wanted.

11 Q. Is that what you meant?

12 A. That is what it meant, it seems to me in my idiosyncratic
13 way of answering, oh well, shoot, we missed December 1st.

14 Q. Is that an appropriate thing for a dean to say in such a
15 serious situation?

16 A. This is an email to Diane Alperin with whom I communicated
17 on a daily basis, we had a somewhat casual and friendly
18 relationship. It was not a formal response to anything, it was
19 informal, maybe a little flip, but reflected the quality of our
20 relationship which was casual.

21 Q. You were in communication with Diane Alperin every day?

22 A. Yes.

23 Q. And between December 2nd -- November 2nd and December 1st,
24 you didn't communicate with Dr. Tracy once?

25 A. Yes, that is right.

1 Q. You never intended to respond Dr. Tracy asking for
2 clarification, did you?

3 A. No. I was reviewing information that I had about Dr.
4 Tracy's assignment and requirements that he had to fulfill his
5 obligations.

6 Q. At this time, you could have told Dr. Tracy what you want
7 on the form, right?

8 A. I wanted him to fill out the outside activity forms and
9 sign off on the assignment.

10 Q. It would be easy to say on December 1st, a one liner, I
11 want you to turn in a form for the blog, right?

12 A. I could have done that. He knew he needed to turn it in.

13 Q. You didn't, did you?

14 A. No, I didn't send an email December 1st.

15 Q. And you didn't respond to his request for clarification on
16 December 2nd, did you?

17 A. Um-m-m, could you refresh my memory as to his request for
18 clarification?

19 Q. Pull up 36, please.

20 He wrote you on November 22nd, and by December 2nd you
21 still had not written him back. Do you see right here in his
22 letter, third paragraph on the monitor here, "I have not yet
23 received the necessary clarification"?

24 A. Correct, that is what he says on November 22nd.

25 Q. "There has been considerable confusion regarding the policy

1 which has left other faculty members and myself confused."

2 You agree Dr. Tracy is telling you he is confused, he wants
3 clarification, right?

4 A. He is stating here there has been considerable confusion.

5 Q. And your response is "oh well," or your response to Diane
6 Alperin with respect to that message?

7 A. The "oh well" does not refer to the email of November 22nd,
8 that is a casual comment I am making to Diane Alperin.

9 Q. Do you see that first line?

10 A. Yes.

11 Q. You have had a chance to look at James Tracy's response to
12 the Notice of Discipline?

13 A. Correct.

14 Q. Is your testimony you weren't referring to that?

15 A. No. My testimony is the casual phrase "oh well" could mean
16 any number of things, and as I indicated, it was a casual
17 communication between myself and Diane Alperin. It does not
18 refer to my flip -- any flippancy regarding his Notice of
19 Discipline.

20 Q. You are saying "oh well" doesn't mean you wanted a response
21 by December 1st, oh well?

22 MR. CURLEY: Objection, cumulative and argumentative.

23 THE COURT: Sustained.

24 BY MR. LEO:

25 Q. As of December 9th, you had not responded to Dr. Tracy's

1 November 22nd request for clarification, did you?

2 A. Correct, I did not respond to Dr. Tracy.

3 Q. And something happened. 61, you got this, right, it hit
4 the papers?

5 A. Yes, I think -- yes, this came out in December.

6 Q. December 10, 3:15 p.m., this article is published, and you
7 learned about it?

8 A. I done not when I lend about it. I see it was published
9 December 10th.

10 Q. This article caused an uproar, media frenzy, right?

11 A. I would characterize it -- yes, that is about right.

12 Q. You started receiving complaints about Professor Tracy,
13 right?

14 A. As I recall, yes.

15 Q. You were forwarding those complaints to many people at the
16 school, weren't you?

17 A. I don't recall if I forwarded it or what I forwarded or to
18 whom.

19 Q. Publish Plaintiff's 19, please. 39, please, please publish
20 39.

21 Do you see that right there? Here, this is a copy, if you
22 want.

23 A. Yes, December 10th.

24 Q. If you want to scroll through it.

25 A. Thank you.

1 Q. So, the same day as the Pozner article, shortly after the
2 article is published, you drafted a termination letter to Dr.
3 Tracy. That is what this document shows, right?

4 A. It shows a draft was sent to Dr. Alperin that day. I
5 imagine that it was written way before the time it was sent to
6 her.

7 Q. So, before December 10th, you already wrote a termination
8 letter to Professor Tracy; is that what you are saying?

9 A. Do you want me to answer yes or no or would you like an
10 explanation?

11 Q. You tell me. Whatever you think you need to tell me.

12 A. So, because he had not filled out his annual assignment
13 appropriately according to the FAIR standards, because he had
14 not done the outside activity forms, acknowledgment of outside
15 activity form requirement when you click the box, he had not
16 met these requirements, when we asked him to do so by issuing a
17 Notice of Discipline, he sent a long letter back indicating
18 that he didn't feel he had to do these things, expressing
19 confusion.

20 In my mind, he knew exactly what he needed to do, and we
21 were asking him to just meet the requirements. You can't
22 expect the university to clear some of your activities until
23 you have reported those activities. He was refusing to report
24 the activities. It felt to me like he was pushing back. At
25 one point, I do recall thinking is he pushing us to the point

1 where he wants us to have further discipline? I didn't want
2 further discipline, I wanted him to fill out his forms and I
3 wanted us to move forward.

4 I did say to Dr. Alperin, is he pushing us to the point
5 where we might consider a notice of termination?

6 At that point, I thought it was prudent to draft a
7 termination letter just in case we had to go to that point. I
8 sent Dr. Alperin that draft on December 10th. The fact that it
9 is the same time as the op ed, I don't know that I saw that op
10 ed that day or the day after. I am busy at work, many people
11 to see, I don't even think I saw the op ed at that time.

12 Q. It is your testimony you didn't see the op ed on
13 December 10th?

14 A. I don't believe I did, but I don't know.

15 Q. I show you what is marked 37-V.

16 THE COURT: V as in Victor?

17 MR. LEO: V as in Victor.

18 BY MR. LEO:

19 Q. Does that indicate that you saw it that day?

20 A. I didn't recall. I did see it that day, I think Lisa
21 Metcalf would have sent it to me, yes.

22 MR. CURLEY: No objection to 37-V.

23 THE COURT: Do you want 37-V in?

24 MR. LEO: Yes, your Honor.

25 THE COURT: 37-V admitted without objection.

1 (Whereupon Plaintiff Exhibit 37-V was marked for evidence.)

2 BY MR. LEO:

3 Q. I want to ask you, all the questions you had and concerns
4 you had about Professor Tracy before December 10th, you didn't
5 call him, you didn't call Dr. Tracy and share any of those
6 thoughts or concerns with him, did you?

7 A. No, I didn't.

8 Q. You didn't have a meeting with him like you did in 2013?

9 A. No.

10 Q. You didn't send him a letter explaining your thoughts and
11 explaining to him what exactly it is that you expected him to
12 do?

13 A. I did send him a Notice of Discipline and outlined what I
14 needed him to do in order to comply with his obligations.

15 Q. Who drafted that letter?

16 A. The Notice of Discipline?

17 Q. The one on the monitor.

18 A. This -- Dr. Alperin sent it, she may have referred to the
19 draft that I sent her, I don't know. She finished this letter,
20 not me.

21 Q. Is this a form letter, something like a template that the
22 university uses to discipline people?

23 A. I don't know. This is the draft, correct?

24 Q. You tell me.

25 A. I am asking you, is this the Notice of Discipline -- notice

1 of termination that was sent to him or is this the draft? This
2 is the draft?

3 Q. Yes.

4 A. I would have written this.

5 Q. You have 39 up there, right?

6 A. I --

7 Q. Would you agree with me you made the decision to terminate
8 Professor Tracy on December 10, 2015?

9 A. No, I would not agree with you.

10 Q. You are saying this notice of termination draft on
11 December 10th is something that was in your back pocket and you
12 were going to throw it away?

13 A. I hoped I could throw it away, yeah, I didn't want to
14 terminate anybody. I certainly didn't want to terminate Dr.
15 Tracy.

16 Q. Who made the decision to terminate Dr. Tracy?

17 A. Dr. Alperin.

18 Q. It was made on December 10th?

19 A. I don't know when she made the decision.

20 Q. But the termination letter was drafted that day, right?

21 A. I don't know if I drafted it on the 9th, 8th, or the 10th.
22 I sent it to Dr. Alperin on the 10th.

23 Q. Isn't it true you are not aware of any document or
24 communication to say that this notice of termination was
25 drafted before December 10th?

1 A. I don't know what I would have been doing the prior days.
2 I know I probably was thinking about it and coming up with
3 proposed paragraphs in my mind at my computer. I don't know
4 what date I started drafting it.

5 Q. At this time, on December 10th, you had not threatened
6 Professor Tracy with termination yet, had you?

7 A. Um-m-m, may I look at the Notice of Discipline? I believe
8 it says something about --

9 Q. You have it up there, right?

10 A. -- you may face additional discipline.

11 Q. You have it in front of you, Exhibit 35.

12 Does that refresh your recollection?

13 A. Yes, I have that.

14 Q. Does it say that Professor Tracy could be terminated?

15 A. Not specifically. Would you like me to tell you what it
16 says?

17 Q. No. I want you to tell me if it says that Professor Tracy
18 could be terminated. Does it say it in there?

19 A. Not specifically, it does not mention that specifically.

20 Q. Are you required to tell Dr. Tracy before you threaten him
21 that his conduct may result in termination?

22 A. There is a notice of proposed discipline, termination, I
23 believe that is required to be sent out prior to the actual
24 termination.

25 Q. Let's publish 34.

1 You recognize 34, don't you?

2 A. Yes, I do.

3 Q. Is that why you rushed this email, because you had to give
4 him notice that he could be terminated if he didn't comply?

5 A. I don't remember this being rushed. It is dated
6 December 11th.

7 Q. When you sent this email giving Dr. Tracy the final
8 warning, what was happening behind the scenes?

9 A. It was the end of another busy semester, we were receiving
10 numbers of complaints concerning that op ed, and there were a
11 number of things going on on the campus.

12 Q. Do you have 38-Q in front of you?

13 A. Yes.

14 Q. The emails.

15 Isn't it true that hours before you gave Professor Tracy
16 his final warning you were communicating with people outside
17 the university complaining about him? Right?

18 A. Yes, that is true.

19 Q. I count one, two, three -- a lot of emails here, would you
20 agree?

21 A. In 38-Q?

22 Q. Yes.

23 A. The first two are the same thing. I am beginning to
24 wonder -- it looks like I sent her two emails.

25 Q. You get a complaint, you send it to Peter Hull and Diane

1 Alperin, right? That was on December 11th, at 2:31?

2 A. Yes.

3 MR. CURLEY: Your Honor, if counsel is going into the
4 content of the document, why don't we put it into evidence.

5 MR. LEO: I am not going into the content, I am asking
6 questions about her communications.

7 THE COURT: What document are you referring to.

8 MR. LEO: 38-Q, your Honor. I have no objection to
9 the document coming in.

10 MR. CURLEY: My objection is you talking about the
11 contents of the document without it being in evidence.

12 MR. LEO: Is there an objection to the admission?

13 MR. CURLEY: I made my objection.

14 THE COURT: Are you seeking to put 38-Q in?

15 MR. LEO: Not at this time.

16 THE COURT: Don't seek to elicit content of a document
17 not in evidence.

18 BY MR. LEO:

19 Q. 38-Q is your investigation into the complaints about Dr.
20 Tracy's blogging, right?

21 A. 38-Q is an email from a community member to which I
22 responded asking her for any information she may have regarding
23 the alleged harassment by Dr. Tracy.

24 Q. Right. And you never contacted Professor Tracy about those
25 allegations, did you?

1 A. Correct, I did not.

2 Q. So, you are taking in information from the outside,
3 accusations against Professor Tracy that you found no evidence
4 to support; is that right?

5 A. Correct. She did not write that.

6 Q. And you didn't ask Professor Tracy anything about that, you
7 didn't want to hear his side of the story?

8 A. Not at that time, no, I did not.

9 Q. In this December 11th email, you would agree this came
10 after your emails with the individuals in 38-Q, right, the one
11 you were just reading from?

12 A. Um-m-m, yes. This email is at 7:09 p.m., which is after
13 the email I received from the community member and after I
14 wrote her back.

15 Q. Right. And after you were communicating with those people,
16 you wrote Professor Tracy this final warning, but in it you did
17 not mention anywhere in here that you were investigating him
18 for harassment, right?

19 A. Was that a question? Correct, there is no mention of any
20 email from -- getting any email from Sandy Hook or Misty Fitch
21 about Dr. Tracy, that is correct.

22 Q. You even called somebody on the telephone who was accusing
23 Professor Tracy about harassing; is that right?

24 A. I do recall a conversation, I don't remember when or who.

25 Q. But you never called Professor Tracy?

1 A. Correct.

2 Q. You never had a conversation with Professor Tracy about
3 what she expected him to do?

4 A. No. I sent him the email.

5 Q. At any point, did you ever call Professor Tracy and talk to
6 him about anything?

7 A. No, I did not.

8 Q. On December 11, before you gave Professor Tracy his final
9 warning, you weren't just reading complaints about Dr. Tracy,
10 you were reading news stories about him; is that right?

11 A. Other than the op ed, I don't remember specifically a news
12 story or date. I need to look at that.

13 MR. LEO: May we publish 37-V?

14 THE COURT: 37-V is admitted without objection, you
15 may publish it.

16 BY MR. LEO:

17 Q. Before you threatened Dr. Tracy with termination on
18 December 11, you sent that article in the *Sun Sentinel* to all
19 of your associate deans in the college?

20 A. Yes, two associate deans, the director of development and
21 advancement and School of Communication and Multimedia Studies.

22 Q. You sent it on the same date that article was published?

23 A. That is correct.

24 Q. You wanted to make sure everyone knew about the complaints
25 about Dr. Tracy, that is why you sent them to everyone?

1 A. No, that is not why I sent it. I sent it -- sorry.

2 MR. CURLEY: You can complete your answer.

3 THE WITNESS: I sent it because it looked to be an
4 article that was going to result in quite a lot of response
5 from the community, and I wanted to give the staff and college
6 who are the administrators the heads up that this was happening
7 so they could be prepared for us to respond.

8 BY MR. LEO:

9 Q. One of your assistant deans wrote you back; is that right?

10 A. That is right.

11 Q. And expressed disgust; is that true?

12 A. I don't know what he was discussing.

13 Q. You were shocked by what you read in the *Sun Sentinel*,
14 weren't you?

15 A. Yes, I was.

16 Q. In the days after this article you received a lot of
17 complaints about Dr. Tracy, didn't you?

18 A. As I recall, quite a few, I don't know how many.

19 Q. You care a great deal about the complaints, right, that is
20 why you investigated them?

21 A. Um-m-m, I cared a great deal. I was concerned about the
22 complaints because it was unfortunate that we were appearing to
23 be entering another period of time where we would be getting
24 quite a bit of negative attention.

25 Q. Right, but you were investigating Professor Tracy about

1 harassment, too, you were trying to ascertain whether he was
2 harassing people, right?

3 A. I was trying to figure out whether he was harassing one of
4 the parents at Sandy Hook.

5 Q. He wasn't, was he?

6 A. I don't know. I never received verification that he was
7 harassing anyone.

8 Q. And you never received any verification he was or wasn't,
9 correct?

10 A. Correct.

11 Q. Let me show you 37-B for identification.

12 On December 14, 2015, just two days before FAU decided to
13 terminate Dr. Tracy officially, you received other complaints
14 about Dr. Tracy, right?

15 A. Yes, this is another complaint.

16 Q. About his blogging, right?

17 A. Um-m-m, it looks to me this person is reading a news story
18 and asking if the news story is possibly true. I don't think
19 it mentions his blog.

20 Q. You thought that this complaint was so important you
21 forwarded it to Peter Hull, Diane Alperin and David Kian,
22 right?

23 A. Yes, I forwarded all the complaints to the upper
24 administration who I felt needed to see them.

25 Q. Peter Hull, he is head of communications at Florida

1 Atlantic University?

2 MR. CURLEY: Again, you can put this into evidence,
3 but if you publish the contents, you should move that in.

4 THE COURT: 37-V is being published, that one is in
5 evidence. 37-B is being discussed for identification only.

6 MR. CURLEY: That is fine, he can put it in. I object
7 to counsel testifying about the contents.

8 THE COURT: Do you seek to admit 37-B?

9 MR. LEO: Your Honor, we can move it in.

10 THE COURT: All right. 37-B is admitted --

11 MR. LEO: I wasn't reading from it.

12 THE COURT: -- without objection.

13 (Whereupon Plaintiff Exhibit 37-B was marked for evidence.)

14 BY MR. LEO:

15 Q. As a dean, you are involved in decisions involving
16 discipline; isn't that right?

17 A. There are many, many jobs of a dean in a college as large
18 as mine, a lot of the complaints go to the heads, from time to
19 time, you meet with faculty. You do things according to the
20 structure that works best for the college.

21 Q. You also served as the principal representative of your
22 college as dean, right?

23 A. Correct.

24 Q. You were a liaison between faculty, administration and the
25 office of the Provost, right?

1 A. Yes.

2 Q. And you communicated to those within and outside the
3 university that the reason for Professor Tracy's termination
4 was for his blogging; isn't that right?

5 A. No. I never communicated that to anybody.

6 Q. You never said that the reason for Professor Tracy's
7 termination was because of his blog as opposed to Tweets?

8 A. No, because it wasn't.

9 Q. I am going to show the witness what is marked as
10 Plaintiff's 45.

11 You sent Plaintiff's 45 to Susan Fulks, Associate Dean of
12 Students. Is that what she was?

13 MR. CURLEY: Your Honor, this is subject to a prior
14 conversation about hearsay. We probably need a sidebar.

15 THE COURT: Let me take a look at it.

16 Okay, I don't see where I made a prior ruling, if you
17 want to come sidebar on it, unless it can be resolved. Are you
18 attempting to have it introduced?

19 MR. LEO: Yes, your Honor.

20 THE COURT: Sidebar.

21 (Proceedings at sidebar.)

22 THE COURT: Do you have a copy of it?

23 MR. LEO: Yes.

24 THE COURT: All right. This is an email from Heather
25 Coltman to Susan Fulks, December 18.

1 MR. CURLEY: This is the Morton statement we talked
2 about earlier, she copied and pasted it and forwarded it to
3 this person here.

4 So, if it is going to come in, it ought to come in
5 through Morton, not through her.

6 THE COURT: So, Morton wrote the statement, Jeffrey
7 Morton wrote the statement as reflected in Plaintiff's Exhibit
8 44, in the email of December 18, 2015 to Joshua Glanzer. So,
9 this is the passage that Jeffrey Morton is representing that he
10 sent to a *New York Times* reporter. It is a passage he sent to
11 the local paper; is that correct?

12 MR. CURLEY: That is correct.

13 THE COURT: Okay. So, what is -- you have Morton on
14 your list, don't you?

15 MR. BENZION: We do have Morton on our list. We have
16 one spin of Morton's statement, but Coltman made it her
17 statement here when she forwarded it to someone in the school.
18 She is a principal representative of the college, liaison
19 between the faculty and Provost, and communicated about these
20 matters within the university. She adopted that statement as
21 her own, as other statements have been deemed adopted in this
22 trial.

23 THE COURT: She did send the email. It seems to me
24 cross-examination would be the place to clean it up, and then I
25 would expect there should be no objection from Plaintiff when

1 Defense asks that this is a statement that came from an email
2 from Jeffrey Morton to Joshua Glanzer.

3 MR. BENZION: They can ask her that.

4 THE COURT: That is the way to handle it.

5 MR. CURLEY: Okay, thank you.

6 THE COURT: Over objection, 45 will come in.

7 (Sidebar concluded.)

8 THE COURT: Plaintiff's Exhibit 45 is admitted over
9 objection.

10 (Whereupon Plaintiff Exhibit 45 was marked for evidence.)

11 MR. LEO: May I publish, your Honor?

12 THE COURT: Yes.

13 BY MR. LEO:

14 Q. This is your message, right, Plaintiff's 45, to Susan
15 Fulks, dated December 18, 2015?

16 A. Yes, I sent a copy of someone else's writing, yes.

17 Q. I see your name down here.

18 A. Correct.

19 Q. There is nobody else's name on here, right?

20 A. Correct.

21 Q. This is Heather Coltman, Dean of the College of Arts and
22 Letters, Florida Atlantic University, right?

23 A. That is right.

24 Q. You are liaison to the faculty and administration, right?

25 A. Yes.

1 Q. Let's talk about what you wrote.

2 A. I didn't write this statement.

3 Q. You didn't send the email?

4 A. I sent the email.

5 Q. You wrote, "with every blog, post, tweet and proclamation
6 of false flags, hoaxes, child actors and millionaire imposter
7 parents, pressures build in the public to strip all faculty of
8 the protections of tenure. His termination both holds Tracy
9 accountable for his despicable behavior and reduces pressure on
10 the elected officials to end tenure."

11 That is what you sent, right?

12 A. I did not write that statement, it was a copy and paste.

13 Q. But you agree that is what you sent, this right here? You
14 agree you sent this?

15 A. Yes, I agree I sent that.

16 Q. And you said you sent this message because you agreed with
17 it, right?

18 A. No, that is not right.

19 Q. Isn't this the real reason FAU fired Professor Tracy?

20 A. No, it is not.

21 Q. This isn't the real reason?

22 A. This is not the real reason.

23 Q. Who did you say wrote this?

24 A. This was written by Jeffrey Morton.

25 Q. And Jeffrey Morton was a faculty member at the university?

1 A. Yes.

2 Q. In your college?

3 A. Yes.

4 Q. He sent this statement to the press, didn't he?

5 A. Yes.

6 Q. To multiple media outlets, didn't he?

7 A. I don't know.

8 Q. You knew about this statement, didn't you?

9 A. Yes, I knew about the statement.

10 Q. Now, when he sent the statement, he didn't include a
11 disclaimer, did he?

12 A. I don't know. Was I copied on an email that he wrote to
13 the media?

14 Q. I show you Plaintiff's 44.

15 Is that what you are referring to, the email you were just
16 referring to?

17 A. Yes. Jeffrey Morton informed four people at FAU that he
18 was sending this message to the local paper.

19 Q. Okay. So, you were aware that Professor Morton was sending
20 this statement to the press?

21 A. Correct.

22 Q. And you were aware Professor Morton did not include a
23 disclaimer that he was not speaking on behalf of the university
24 when he sent that message?

25 A. I don't know if he included a disclaimer when he sent this

1 message, but I do believe when he posted this message, he was
2 not representing himself as a member of the faculty at FAU.

3 Q. But he didn't say that?

4 A. I don't know. I don't know what he sent to the media
5 outlet.

6 Q. That statement you are looking at, he didn't say I am not
7 speaking on behalf of the school, did he?

8 A. Correct, he did not say that.

9 Q. He didn't have a disclaimer, right?

10 A. I don't know whether or not he included a disclaimer when
11 he sent it to the media. I do know when he posted this
12 statement he did not indicate he was a member of the faculty of
13 FAU.

14 Q. Right. He violated 5.3, didn't he?

15 A. I don't believe so.

16 Q. Don't you have to disclaim, isn't that what the testimony
17 is so far?

18 A. If you are representing yourself as a faculty member of the
19 institution, we do require that disclaimer. When he sent this
20 to the media, I don't believe he represented himself as a
21 member of the faculty.

22 Q. He didn't send a disclaimer, right?

23 A. I don't know what he sent to the paper.

24 MR. CURLEY: This is argumentative and cumulative.

25 THE COURT: Sustained.

1 BY MR. LEO:

2 Q. He got permission when he sent that, didn't he?

3 A. No, he was not requesting permission and nobody gave him
4 permission.

5 Q. Glanzer didn't say you can't send this statement, to your
6 knowledge?

7 A. No.

8 Q. And you didn't tell him?

9 A. No. Faculty are able to express their opinions, they have
10 that freedom.

11 Q. Right, and they are allowed to speak without disclaimers if
12 it is something the university agrees with, right?

13 A. No. If you are publishing something and you do not mention
14 your affiliation with the university, a disclaimer is not
15 needed.

16 Q. Right, it is not needed if you agree with them.

17 MR. CURLEY: Objection, move to strike.

18 MR. LEO: Your Honor --

19 THE COURT: Sustained. I ask the jury to disregard
20 the last statement by counsel.

21 BY MR. LEO:

22 Q. I show you what is marked Plaintiff's 85.

23 You recognize this, don't you?

24 A. It looks like a -- it is a drink with some lemon in it, a
25 picture.

1 Q. A picture you sent to Lisa Metcalf --

2 THE COURT: Which number is it?

3 MR. LEO: 85, your Honor.

4 BY MR. LEO:

5 Q. A picture you sent on January 6, 2016, right?

6 A. Yes.

7 Q. In response to another picture from Lisa Metcalf, right?

8 A. Yes.

9 Q. Hum. You were communicating using your school email,
10 right?

11 A. Yes.

12 Q. You use your school email to do business at the university;
13 isn't that right?

14 A. Yes.

15 Q. So, when you were communicating, you were doing it as part
16 of your job?

17 A. Yes, we were communicating as employees of the university.

18 MR. LEO: At this time we move 85 into evidence.

19 THE COURT: Response.

20 MR. CURLEY: It is a personal email, your Honor, that
21 is our objection. Not in their cap -- it is a personal email,
22 not sent in their capacity as representatives of the
23 university. We object on that basis, your Honor.

24 THE COURT: I am going to overrule the objection.

25 Plaintiff's 85 is admitted over objection.

1 (Whereupon Plaintiff Exhibit 85 was marked for evidence.)

2 MR. LEO: May I publish, your Honor?

3 THE COURT: Yes.

4 BY MR. LEO:

5 Q. The day FAU officially terminated Professor Tracy, right,
6 you sent this picture to Lisa Metcalf. Is that fair and
7 accurate?

8 A. Yes, the day that happened, I accept sent the picture to
9 Lisa Metcalf.

10 Q. And that was in response to Lisa Metcalf's picture, right?

11 A. Correct.

12 Q. This is a woman with her hands in the air like this, right?

13 A. Correct.

14 Q. So, on January 6th, Lisa Metcalf sends a picture with the
15 woman with her hands in the air in the water, and in response
16 you send her a cocktail?

17 A. I am not sure it was a cocktail, it is a drink with lemon.

18 Q. Was it cocktail time?

19 A. I don't know how to answer that.

20 No, it is 4:00 o'clock, and we are at work.

21 Q. You were celebrating, weren't you?

22 A. No. This was not about celebrating anything, this is about
23 supporting in a friendly way, showing, hey, this has been
24 tough, you know, let's just relax.

25 I am going to guess her picture indicates, hey, let's have

1 some time at the beach, this has been a tough time, and I
2 responded, yes, let's take a drink and relax.

3 Q. You sent this one down here, right, having a nice day?

4 A. Yes, I did say that.

5 Q. That is in response to Lisa Metcalf sending you an article
6 about Professor Tracy losing his job?

7 A. Yes, that is my casual friendly way of saying wow, this is
8 going to be a big news day, having a nice day, just like my
9 relationship with Diane Alperin and my relationship with Lisa,
10 casual, friendly, hey, it is going to be a big day here, a
11 little ironic.

12 Q. Were you celebrating his termination?

13 A. No.

14 Q. You found that winning metaphor, didn't you?

15 A. Could you repeat the question.

16 Q. You found the winning metaphor?

17 A. I don't know what you mean.

18 Q. Do you remember the note "First Amendment, find winning
19 metaphors"?

20 A. Yes, I remember those notes.

21 Q. That is what you are celebrating, you found a winning
22 metaphor?

23 A. No. This is not a celebration, this is a big news day, you
24 probably should spend it after going to the beach, get
25 something nice to drink at the beach, casual, friendly.

1 Q. You felt Professor Tracy was crazy, right?

2 A. Crazy, no.

3 Q. Let me show you what is marked 38-0.

4 MR. BENZION: O.

5 MR. LEO: 38-0.

6 BY MR. LEO:

7 Q. You recognize 38-0, don't you?

8 A. Yes.

9 Q. She is also an employee of the university?

10 A. Yes.

11 Q. You were communicating on your school email?

12 A. Yes.

13 Q. You were doing so within the scope of your employment,
14 right?

15 A. Yes.

16 MR. LEO: Your Honor, at this time we move 38-0 into
17 evidence.

18 THE COURT: Any objection?

19 MR. CURLEY: No, it is fine, your Honor.

20 THE COURT: This is 38-0?

21 MR. LEO: Yes.

22 THE COURT: Plaintiff's 38-0 is admitted over
23 objection. No, 38-0 is admitted without objection.

24 (Whereupon Plaintiff Exhibit 38-0 was marked for evidence.)
25

1 BY MR. LEO:

2 Q. You sent this email?

3 A. Yes.

4 Q. You were checking out Professor Tracy's blog at the time?

5 A. Yes, it looks to me I looked at the blog on February 7th.

6 Q. And you said "nut job," right?

7 A. Yes.

8 Q. On this day, you thought he was a nut job, right?

9 A. Well, yeah. I couldn't understand why he thought
10 everything was a conspiracy, so, yeah, I thought it was a
11 little nutty.

12 Q. You thought he was crazy, right?

13 A. I used the word nut job, that means something to me
14 different than crazy. I don't want to parse words.

15 Q. What is nut job --

16 THE COURT: Don't cut the witness off.

17 MR. LEO: Sorry.

18 THE WITNESS: Again, this is another instance of my
19 casual, light-hearted way of using words, yeah, kind of a nut
20 job. He seemed to have this theory that we were out to get him
21 because of his blog and that was never the case. Yes, kind of
22 nutty.

23 BY MR. LEO:

24 Q. And you thought that before you fired him, too, right?

25 A. I was really confused why he didn't comply with the

1 university's requirements, I felt that was pushing the
2 envelope, yes.

3 Q. I show you what is marked 38-G.

4 THE COURT: Which one?

5 MR. LEO: 38-G.

6 BY MR. LEO:

7 Q. You recognize this, don't you?

8 A. Yes, I do.

9 Q. This is a communication between you and Jeffrey Morton, a
10 professor?

11 A. Yes.

12 Q. And you were communicating on your school email?

13 A. Yes.

14 Q. This is within the scope of your employment at the
15 university?

16 A. Yes.

17 MR. LEO: I move 38-G into evidence.

18 MR. CURLEY: Personal commentary, beyond that, no
19 objection.

20 THE COURT: Over objection, 38-G is admitted.

21 (Whereupon Plaintiff Exhibit 38-G was marked for evidence.)

22 MR. LEO: May I publish?

23 THE COURT: Yes.

24 BY MR. LEO:

25 Q. So, Jeffrey Morton writes you after the proposed notice of

1 termination "tenureisnotimmunity should be" -- I am sorry,
2 #tenureisnotimmunity should be trending" right?

3 A. Yes, that is what he emailed.

4 Q. Did you agree with him, #tenureisnotimmunity should be
5 trending?

6 A. No. I thought it was a light-hearted comment.

7 Q. Do you think this is appropriate discussion between a dean
8 and faculty member about a termination of another faculty
9 member?

10 A. Again, this indicates a casual friendly kind of repartee
11 between myself and Jeffrey Morton.

12 Q. Not very friendly to Dr. Tracy, is it?

13 A. Um-m-m, I believe we are talking about a TV clip.

14 Q. About Dr. Tracy, right?

15 MR. CURLEY: Your Honor, I would like the witness to
16 be able to finish her answers.

17 THE COURT: Yes, don't cut the witness off.

18 THE WITNESS: It looks like this is a TV clip of a
19 James Tracy story on the Today Show. It looks like somebody on
20 that show talked about a conspiracy. I made a light-hearted
21 joke about that, and Jeffrey Morton made a light-hearted ironic
22 comment back to me. These are casual comments.

23 BY MR. LEO:

24 Q. You thought Dr. Tracy was a joke?

25 A. A joke? No, I don't think he was a joke.

1 Q. You are joking about him, right?

2 A. It is light-hearted comments.

3 Q. Is this the highest standard of ethics at FAU?

4 A. For someone to make an ironic comment with a hash tag?

5 Q. Let me show you what is marked Plaintiff's 49. Do you
6 recognize this?

7 A. Yes, I do.

8 Q. Who is Carol Hixson?

9 A. The Dean of the University Libraries at FAU.

10 Q. That is the dean of Professor Tracy's spouse, isn't it?

11 A. Yes.

12 Q. And when you were communicating with that dean, you were
13 doing so on your school email?

14 A. Yes.

15 Q. And within the course and scope of your employment at the
16 university?

17 A. Yes.

18 MR. LEO: Your Honor, at this time we move 49 --

19 MR. CURLEY: No objection.

20 MR. LEO: We move 49, your Honor.

21 THE COURT: 49 admitted without objection.

22 (Whereupon Plaintiff Exhibit 49 was marked for evidence.)

23 MR. LEO: May we publish?

24 THE COURT: Yes.

25

1 BY MR. LEO:

2 Q. Scroll down.

3 Shortly after Professor Tracy was officially terminated,
4 you wrote to Professor Tracy's spouse's supervisor, "How is
5 your employee? Mine is packing up his office today," right?

6 A. Yes.

7 Q. You thought it was pretty funny, didn't you?

8 A. No. There is no joke here, I was actually inquiring as to
9 how Dr. Tracy's wife was doing.

10 Q. I show you what is marked Plaintiff's 24. It is your
11 testimony you didn't enjoy his termination at the time?

12 A. No.

13 MR. CURLEY: Your Honor, this is subject to a prior
14 ruling and it has been excluded.

15 THE COURT: Well, I -- if I ruled on it and I excluded
16 it, it shouldn't come in. If there is a dispute about that, we
17 need to take it up.

18 MR. BENZION: There is a dispute, your Honor.

19 THE COURT: Okay, I am not aware of a prior ruling, so
20 is there a basis for the objection?

21 MR. CURLEY: We need to approach, your Honor.

22 THE COURT: Okay.

23 MR. CURLEY: Maybe now is a good time for a break.

24 THE COURT: We can take our morning break at this
25 time. Ladies and gentlemen, we will go into recess for 15

1 minutes. So, it is 10:36, so -- 10:35. At about ten minutes
2 to 11:00 we'll return, with the same instruction not to discuss
3 the case, not to have any contact with anyone associated with
4 the case, not to do any research, and I will see everybody back
5 in 15 minutes.

6 *(Thereupon, the jury leaves the courtroom.)*

7 *THE COURT:* All right. So, we have Plaintiff's
8 Exhibit 24 and it seems to be an email stream, starting at the
9 top there is --

10 *MR. BENZION:* Pardon me, your Honor, may we ask that
11 the witness exit the courtroom before we have this discussion?

12 *THE COURT:* Yes. Dr. Coltman, you may be excused.
13 You remain under oath, do not discuss your testimony with
14 anyone, and we will be in recess for about ten minutes.
15 Thanks.

16 *(The witness exits the courtroom.)*

17 *THE COURT:* Let's first identify what the document is.
18 It is an email chain and at the top is an email from Heather
19 Coltman to Diane Alperin, dated November 20, 2016, and then
20 below that there is an email from Barrios Barclay or Barclay
21 Barrios to Heather Coltman, and Barclay Barrios is assistant
22 dean, and below that there is an email from Karen Leader to
23 Barclay Barrios, dated January 20, 2016, it doesn't say who
24 Karen leader is.

25 And then below that is another email from Barclay

1 Barrios to Karen Leader, and below that, one from Karen leader
2 to Barclay Barrios, and below that, from Heather Coltman to a
3 group of people and one more email from Diane Alperin to a
4 group of people. There is a series of email chains here.

5 So, you want to take it piece by piece or is it the
6 entirety of the document? Let me ask what the basis is for
7 Plaintiff having it in and what you would be asking the witness
8 about.

9 MR. BENZION: Your Honor, we are asking the witness
10 about specifically, really the first page -- okay, on the
11 second page -- basically, to generally describe the email
12 chain. It is communications between faculty, associate deans,
13 deans, and the Provost discussing the policy and things that
14 are reportable under the policy, and things laid out in the
15 FAIR program, and questions answered by Barclay Barrios in the
16 emails regarding the policy.

17 In one email in particular, Barclay Barrios says, "for
18 the record, Tracey was not fired because he didn't report
19 things."

20 This gentleman is a dean under Heather Coltman, who is
21 one of the decision-makers in the firing, and we intend to
22 introduce the document for the discussion about the policy and
23 for this statement here.

24 THE COURT: Which is the email from Barclay Barrios?

25 MR. BENZION: On the second page, about the middle of

1 the page, January 20, 2016 email, 1:10 p.m.

2 MS. GRIFFIN: Barclay Barrios was not in the
3 determination to terminate Dr. Tracy, and the Court said you
4 would not allow subjective comments about the termination.

5 FAIR has to do with how faculty members receive their
6 annual assignments, it is not about the outside activities
7 policy. And Karen Leader makes a reference here with her
8 subjective interpretation of why Dr. Tracy was fired, and she
9 was not involved in the discipline. We have non decision
10 makers injecting their own interpretation relating to Dr.
11 Tracy's termination, which they have no decision-making in and
12 is highly prejudicial.

13 THE COURT: Barclay Barrios, A, if he does not have
14 personal knowledge, and B, not within the scope of his duties
15 and responsibilities to have disciplined James Tracy such that
16 he would know why he was fired or not fired, I guess two
17 different things, but ultimately an email regarding the reason
18 that James Tracey was terminated by another party, Barclay
19 Barrios, would be hearsay unless it is 801(d)(2)(D), which we
20 have relied upon a bit. In which case it would have to be
21 within the scope of his job as interim chair of visual arts and
22 art history.

23 So, he would have to, as a preliminary matter, lay a
24 foundation that it was within his scope to, you know, to speak
25 on and be involved in matters relating to discipline of

1 employees and other faculty members, including James Tracy.

2 Is there something you think you have or would lay a
3 foundation through Dr. Coltman?

4 *MR. BENZION:* We believe we could lay the foundation
5 through Dr. Coltman.

6 One of these emails from Diane Alperin sets forth
7 there is a draft of FAIR assignment and activity category
8 definitions.

9 *THE COURT:* We --

10 *MR. BENZION:* That is on 2298.

11 *THE COURT:* That is from Diane Alperin?

12 *MR. BENZION:* Yes.

13 *THE COURT:* That has to do with a draft of FAIR
14 assignment.

15 *MR. BENZION:* And activity category definitions.

16 *THE COURT:* She testified about that. Any objection
17 to that portion on Bates 2298? Just -- that is about FAIR from
18 Diane Alperin to the group of people on December 8, 2015, at
19 5:50 p.m. Is the Defendant objecting to that portion of the
20 email?

21 *MS. GRIFFIN:* Your Honor, we believe it would create
22 some confusion. Those definitions relate to the definitions
23 that are part of the FAIR assignment. That explains where
24 teaching, research and activity should be listed where the
25 deans are explaining or putting in the annual assignment. It

1 is not related to the outside activities policy. Dr. Alperin
2 presented this explanation in the corporate rep deposition.

3 *THE COURT:* What is the confusion?

4 *MS. GRIFFIN:* The jurors would confuse the FAIR
5 definition with the definition of the outside activities
6 policy.

7 This goes to how to categorize items in the annual
8 assignment, not what an outside activity would be.

9 *THE COURT:* All right. So, any response on that part
10 first?

11 *MR. BENZION:* Yes, your Honor, if you follow the email
12 chain to Karen Leader's email on the next Bate stamp, 2297, it
13 is clear that Karen Leader believes this is a conversation
14 about FAIR and reporting activities.

15 *THE COURT:* Well, Karen Leader is who?

16 *MR. BENZION:* A faculty member at Florida Atlantic
17 University.

18 *THE COURT:* What basis would you have to get Karen
19 Leader's email in.

20 *MR. BENZION:* Talking about understanding and
21 compliance with the policy at Florida Atlantic University.

22 *THE COURT:* That is fine, I haven't precluded you from
23 bringing in witnesses to testify about confusion. Right now,
24 that is hearsay, that is not within the scope of her
25 employment. That is a faculty member speaking about, I guess,

1 some confusion.

2 I've allowed you to bring witnesses in. I don't see
3 Karen Leader coming in, that is hearsay. I don't see that as
4 801(d), if that is the basis for arguing that Diane Alperin
5 should come in. I don't think Diane Alperin has come in, she
6 has testified, you had ample opportunity to ask about FAIR, and
7 the likelihood of confusion outweighs any probative value given
8 how long she was on the stand and how she was extensively
9 questioned about all things, including FAIR.

10 We can move up the email chain. That is the ruling on
11 those two.

12 Now we are back at Barclay Barrios, January 2016, that
13 is Bate stamp 2297, and I think what I just said stands.

14 I don't know, shall we bring Coltman in early and have
15 a proffer and see if she tells us that is Barrios Barclay's
16 job, and he would know the reason why James Tracey was fired?

17 *MR. BENZION:* We think she will say this email was
18 sent in the scope of his employment.

19 *THE COURT:* It's not sent within the scope. Speaking
20 about a matter that was made by the party's agent on a matter
21 within the scope of that relationship and while it existed.

22 Yes, we know he is a faculty member and probably
23 writing it from -- I don't know if he was writing it in his
24 email. I am focused on the person's job. If she doesn't say
25 it is, I am not going to let it in.

1 MR. BENZION: I understand. To clarify, Dr. Coltman
2 will lay the foundation these matters are within the scope of
3 Mr. Barrios' employment, and here is the Plaintiff's argument,
4 so long as the agent, servant or employee -- the statement is
5 made during the relationship and the matters are within the
6 scope of the employment it is admissible against the principal
7 even though he did not have -- that is 801(d)(2)(D).

8 THE COURT: All right. I want to hear a brief
9 response. We will take a break and have Dr. Coltman on the
10 stand as a proffer first before I bring the jury in.

11 MR. FEICHT: We want to make sure the proffer includes
12 the question was it within the scope of Barclay Barrios'
13 employment or agency to make statements on the reasons for Dr.
14 Tracy's termination.

15 What they have done with Dr. Coltman already several
16 times is ask whether Dean Coltman is sending within the scope
17 of her employment, that is a broader question. They need to
18 establish a sufficient foundation to prove that Barclay Barrios
19 is sending emails, but he is within the scope of the employment
20 providing his opinions on the reason for the termination.

21 THE COURT: I will allow you to ask that in the
22 cross-examination.

23 MR. FEICHT: Thank you.

24 *(Thereupon, a short recess was taken.)*

25 THE COURT: If I could ask Dr. Coltman to step out for

1 a moment.

2 We can bring her on the stand very quickly and do a
3 proffer. These were to be worked out in advance, you were to
4 bring to my attention if there are exhibits that are not agreed
5 upon.

6 There is applicable case law, including but not
7 limited to Horne versus Turner Construction Company, 289 F.3d,
8 11th Circuit, 2005, City of Tuscaloosa versus Hargroves
9 Chemicals Inc., 11th Circuit, 158 F.3d, looks like it begins on
10 page 548, and basically, you know, the bottom line is, as I
11 pretty much indicated, the Horne case speaks about,
12 furthermore, headnote one, Turner's claim that the statements
13 upon which Horne relies are inadmissible hearsay fails.
14 Although Valderrama's statements to Cheek and Cheek's
15 subsequent statements to Horne and Daniels appear to fall
16 within the definition of hearsay as a statement, other than one
17 made by the declarant while testifying at the trial or hearing,
18 offered in evidence to prove the truth of the matter
19 asserted -- that is 801(c) -- both levels of statements fall
20 within the hearsay exclusion of statements made by a party's
21 agent or servant concerning a matter within the scope of the
22 agency or employment made during the existence of the
23 relationship which are deemed admissions by a party opponent.
24 Federal Rule of Evidence 801(d)(2)(D).

25 On this basis, we have held previously that statements

1 made by a supervisor who has a role in the decision-making
2 process are generally admissible. *Miles v M.N.C. Corp*, 750,
3 F.2 867, 873 to 75, Eleventh Circuit, 1985.

4 Both Cheek and Valderrama were superintendents with
5 authority to hire and fire employees on the construction site
6 and their statements were therefore made within the scope of
7 their authority. And *City of Tuscaloosa* is similar, *Horne* is
8 not published, *Tuscaloosa* is, and there they found the
9 statement was not within the scope of the manager's employment.

10 If you want to take the time to put Coltman on the
11 stand to ask her whether it was within the scope of Barclay
12 Barrios' testimony to make these firing and hiring decisions,
13 if you have a good faith basis to believe it was, let's bring
14 her in and ask her outside the jury's hearing. That is the
15 only way it could come in.

16 *MR. BENZION*: Understood. While doing the proffer, we
17 would like to address the proffer on Exhibit 2 that was
18 redacted. This is the witness that we could lay that
19 foundation through and see if there is a foundation for the
20 parts of Exhibit 2, which are the notes created by this
21 witness.

22 This is the moment that we could ask this witness --

23 *THE COURT*: Plaintiff's Exhibit 2?

24 *MR. BENZION*: That is correct, your Honor. On the
25 third page of the exhibit there was a redaction, a number of

1 notes. It was introduced as 2-A.

2 *THE COURT:* You are talking about the part about
3 impact and the part about -- there was a second section, so the
4 two redacted portions?

5 *MR. BENZION:* Yes. We are only going to focus on the
6 one redacted portion, the impact, your Honor.

7 *THE COURT:* So that is page three.

8 *MR. BENZION:* Yes, your Honor.

9 *THE COURT:* You can ask her about it.

10 Let's bring Dr. Coltman back in.

11 (The witness enters the courtroom.)

12 *THE COURT:* Okay, Dr. Coltman, would you come to the
13 stand. We are going to do a proffer, it is outside the jury's
14 hearing, and both sides will be able to ask you a couple of
15 questions about evidentiary rulings. Your testimony will be
16 helpful on that. Thank you for your patience.

17 You may begin with the proffer, make it brief, go
18 right to the point.

19 *BY MR. LEO:*

20 Q. Dr. Coltman, if I could direct your attention to Exhibit 24
21 in front of you?

22 A. Yes.

23 Q. Isn't it true Barclay Barrios was an assistant dean at your
24 school?

25 A. Yes.

1 Q. As assistant dean, he sometimes was responsible for
2 communicating with faculty regarding matters of discipline and
3 termination?

4 A. He was at that time the interim chair of the Department of
5 Visual Arts, Karen Leader was a faculty member in that
6 department. In this particular matter, that is why he was
7 responding to her, he was her supervisor.

8 Q. He was responsible for communicating with her concerning
9 discipline and termination matters?

10 A. No. He would not talk about a personnel matter that wasn't
11 related to this particular faculty member.

12 Q. As assistant dean, he was involved in Professor Tracy's
13 firing?

14 A. No, not at all.

15 THE COURT: That answers the question.

16 So, you are not going to seek to get that in, correct,
17 24?

18 MR. LEO: We would move what is marked as 24 into
19 evidence. We would seek to move it in.

20 THE COURT: Her testimony just established that it
21 doesn't come in.

22 MR. BLICKENSDEFFER: For appellate purposes to
23 preserve our objection.

24 THE COURT: Okay, let me be clear that in light of her
25 testimony, based on the legal issue we just discussed, do you

1 acknowledge that this was not within the scope of what his job
2 responsibilities were based on the answer from the witness?

3 MR. LEO: That was the witness' testimony, but we do
4 not necessarily agree with that.

5 THE COURT: That was the witness' testimony.

6 MR. LEO: Yes. We don't agree with the testimony or
7 concede that it was not within the scope of his employment.

8 THE COURT: But based on her testimony, that portion
9 does not come in for all of the reasons that I laid on the
10 record -- established on the record before.

11 My question now is, are you not seeking to put 24 in?
12 I made a ruling as to that portion. Is there any other portion
13 you were seeking to have in? I want to be clear.

14 MR. LEO: We would proceed to move the entire 24 in --
15 just that portion, January 20, 2016, at 1:10 p.m., the
16 statement by Barclay Barrios on page two, page two, in the
17 middle.

18 THE COURT: You are just seeking the Bate stamp 2297
19 of Plaintiff's Exhibit 24, which is an email from Barclay
20 Barrios to Karen Leader, that is all you wanted in?

21 MR. LEO: Yes.

22 THE COURT: January 20, 2016.

23 MR. LEO: Yes, your Honor.

24 THE COURT: Okay, and the Court, for the legal reasons
25 the Court gave before Dr. Coltman came in in conjunction with

1 her testimony, is not allowing it to come in.

2 Any further questioning Defense wanted to do
3 nevertheless of the witness on that issue?

4 MR. LEO: No, your Honor.

5 THE COURT: Did Defense.

6 MR. FEICHT: On Exhibit 24, no.

7 THE COURT: Defendant's 24 is marked for
8 identification -- Plaintiff's Exhibit 24, it is marked for
9 identification. And you want to now direct the witness'
10 attention to which exhibit?

11 MR. LEO: Plaintiff's 2, Exhibit 2, page three.
12 Bottom of page three.

13 THE COURT: Was there a question?

14 MR. LEO: May I inquire?

15 THE COURT: Yes.

16 BY MR. LEO:

17 Q. Dr. Coltman, you recorded the statements impacting
18 everything underneath that; is that right?

19 A. Yes, I wrote those words.

20 Q. And these notes were statements that either someone said
21 that was in the meeting or they were your own thoughts; is that
22 correct?

23 A. Yes.

24 Q. So, they are either --

25 MR. LEO: Your Honor, at this time we would move the

1 remaining portion of this page of Exhibit 2 into evidence.

2 MS. GRIFFIN: We object and would like to ask
3 questions of the witness on proffer.

4 THE COURT: Yes, you may.

5 **CROSS-EXAMINATION**

6 MR. BENZION: Your Honor, is this a leading
7 examination or direct examination of this witness at this time?

8 THE COURT: Counsel may respond.

9 MS. GRIFFIN: Given that it is a proffer, it would be
10 during their direct, and we would have an opportunity to cross,
11 I believe I should be able to lead.

12 THE COURT: Okay, you may.

13 BY MS. GRIFFIN:

14 Q. Dr. Coltman, do you know exactly who said "black eye on all
15 faculty"?

16 A. No, I don't.

17 Q. Was everything being discussed at this meeting -- were
18 those things people in the meeting were saying or reporting
19 things that they heard around campus?

20 A. Both of those things.

21 Q. So you don't know who said "black eye on all faculty,"
22 correct?

23 A. Correct.

24 Q. Do you know who said "chose reckless and irresponsible"?

25 A. No.

1 Q. Do you know who said "would be a poster child"?

2 A. No.

3 Q. Do you know who said "quit UFF membership"?

4 A. No.

5 Q. To your recollection, were any of these people making these
6 comments personally as administrators at FAU?

7 A. No.

8 MS. GRIFFIN: That is all, your Honor.

9 THE COURT: All right. The ruling stands as to
10 Exhibit 2.

11 Okay, we will bring our jury back in.

12 MR. LEO: I want to address 38-Q.

13 THE COURT: We are not going to address anything any
14 more, the jury has been out since 10:36, it has been an hour.

15 Let's bring the jury back in, please.

16 You know, these are 15 minute breaks, not hour breaks.
17 You can bring it to the Court's attention in the morning, over
18 the lunch hour, at the end of the day, not on the jury's time.
19 We have been going with the witness three hours and 29 seconds
20 now.

21 MR. LEO: We have one issue to address.

22 THE COURT: Try to work it out. Be mindful of the
23 jury's time.

24 MR. LEO: We are finished.

25 (Thereupon, the jury returned to the courtroom.)

1 *THE COURT:* Welcome back, everybody. We needed to
2 work out additional legal issues.

3 Any further questions from counsel?

4 *MR. LEO:* Your Honor, at this time we move 38-Q into
5 evidence.

6 *THE COURT:* Plaintiff's 38-Q, any objection?

7 *MR. CURLEY:* None, your Honor.

8 *THE COURT:* All right. 38-Q is admitted without
9 objection.

10 (Whereupon Plaintiff Exhibit 38-Q was marked for evidence.)

11 *MR. LEO:* We have no further questions at this time.

12 *THE COURT:* Okay. Now, we'll turn it over to
13 cross-examination and then you can inform the Court if and when
14 there would be a direct examination.

15 You may begin.

16 **CROSS-EXAMINATION**

17 *BY MR. CURLEY:*

18 Q. Hi, how you doing?

19 A. I'm great. How are you?

20 Q. Good. I have a few questions and we will go through some
21 of the things you were asked about.

22 Let's put things in time order. Could you put up
23 Plaintiff's 39.

24 Okay. So, we are looking at Plaintiff's 39, and this is
25 the draft letter of termination that you did; is that right?

1 A. Yes.

2 Q. And you were talking about you think you did it before, it
3 looks like you sent it on -- the draft on December 10, 2015,
4 right?

5 A. Yes.

6 Q. And what is the time that you have there?

7 A. Um-m-m, 1623, so that would be about 4:00 o'clock.

8 Q. Okay.

9 A. 4:23.

10 Q. Let's be perfectly clear about the time.

11 Can you highlight that, please. Let me see if I can do it.

12 Do you see the time?

13 A. Yes, 4:23 p.m.

14 Q. Can you scroll over to the next page, please.

15 This is the draft notice of termination that you prepared?

16 A. Yes.

17 Q. And is it fair to say at this point in time there was at
18 least some consideration of the potential that Professor
19 Tracy's employment might terminate?

20 A. Correct.

21 Q. The suggestion was that the Pozner article might have
22 prompted you.

23 MR. CURLEY: Can we put 37-V up, please. May I
24 approach, your Honor?

25 THE COURT: Yes.

1 MR. CURLEY: 37-V, please. 37-V as in violent.

2 BY MR. CURLEY:

3 Q. Okay, so we've got 37-V up here, and this is the email of
4 the article having to do with the Pozners, right?

5 A. Yes.

6 Q. Who is Lisa Metcalf? Tell the jury who she is and what she
7 does.

8 A. Lisa Metcalf was the university spokesperson, she worked in
9 the Division of Media Affairs and Communication. She would
10 have been the spokesperson for the university.

11 Q. When did she send you the Pozner article?

12 A. December 10th, 4:25 p.m.

13 Q. At 4:25 p.m. she sends it to you?

14 A. Yes.

15 Q. Is this the first time it comes across your bow or someone
16 sending it to you?

17 A. Yes.

18 Q. Let's go back, that is 4:25. Let's see when you sent the
19 draft letter of termination to Diane Alperin. 4:23?

20 A. 4:23.

21 Q. You sent the draft letter of termination before you even
22 heard about the Pozner article, correct?

23 A. Correct.

24 Q. Okay. We are in December 10th now. Your next action was
25 to send Professor Tracy a letter saying one more chance, right?

1 A. Correct.

2 Q. Why didn't you just terminate him?

3 A. I wanted to give him a chance to comply, I didn't want to
4 terminate him. I didn't want to fire anybody, I wanted him to
5 comply so we could just keep going forward.

6 Q. 2013, let's go back a little bit. All the same note stuff
7 coming out, a lot of consternation, you talked about that. Why
8 didn't you terminate him then, three years earlier?

9 A. I didn't want to terminate him, I wanted him to comply with
10 the obligations he had as a faculty member. He has freedom to
11 express opinion, that didn't mean him to be terminated because
12 I didn't like his opinions.

13 Q. You were asked that -- counsel asked about Mr. Morton. I
14 am skipping around here, I apologize. In 2015, can you tell
15 the jury who he is?

16 A. Yes, Jeffrey Morton is a professor in the Department of
17 Political Science, so he was in my college -- not my college,
18 in the College of Arts and Letters.

19 Q. That would be Plaintiff's Exhibit 45. Could you put that
20 up. I assume you don't have that. Let me put that up for you.

21 Okay, this is 45. This was an email that you sent to Susan
22 Fulks, right?

23 A. Correct.

24 Q. Is the email something you wrote?

25 A. No.

1 Q. Who wrote it?

2 A. Jeffrey Morton.

3 Q. Again, who is he?

4 A. A professor of political science in the college.

5 Q. And you were explaining why you didn't stop him or prevent
6 him from sending out this -- he sent it to the newspaper or
7 something. How did it go?

8 A. As I recall, I believe the *New York Times* had written him
9 requesting comment or something like that, and I believe he
10 subsequently determined to send a statement to the *Sun*
11 *Sentinel*. I may have that wrong. Yeah, he sent this out
12 because he was able to make a statement as a matter of opinion.

13 Q. And you said -- you were asked why didn't he get a
14 disclaimer or get disciplined for that. Why didn't he?

15 A. When he posted it he didn't list his name as a faculty of
16 FAU.

17 Q. Why didn't you discipline him?

18 A. Faculty have a right to express their opinion.

19 Q. That is free speech?

20 A. This is free speech.

21 Q. Why were you sending it to Susan Fulks?

22 A. Susan and I had breakfast that day, or lunch that day and
23 this had come up. I believe she asked if I had a copy of the
24 statement that had appeared in the paper. I don't remember if
25 she asked for it or if I volunteered to send it to her.

1 Q. Okay. So, let's go back to 2013 for a minute. I asked you
2 why didn't you fire Professor Tracy then?

3 A. He is a tenured professor, he is in in a unit that's very
4 busy, a lot of students. I didn't want to fire him, I wanted
5 him to meet his obligations as a faculty member.

6 Q. We saw some notes, you were asked some questions. That
7 might be 2, Plaintiff's 2. Do you remember those?

8 A. Yes.

9 Q. And at that point in time, I think you told the jury, and I
10 don't want to be too repetitive here, you told the jury you had
11 some meetings and then met with Professor Tracy to get his
12 point of view on what was going on, right?

13 A. That is correct.

14 Q. Were there safety concerns at the time about what was
15 happening?

16 A. Definitely.

17 Q. And could you explain to the jury the kinds of issues that
18 were being presented at that point in time and as things went
19 forward with respect to safety of Professor Tracy, the faculty,
20 his family, the whole ball of wax?

21 A. Certainly.

22 MR. LEO: Objection, cumulative.

23 THE COURT: Overruled. You may answer.

24 THE WITNESS: We were very quickly inundated with
25 many, many emails, plus phone calls, and I believe even regular

1 mail from people who were very upset with what Dr. Tracy had
2 posted.

3 The university was inundated with these kind of
4 communications in our college, the phone was ringing off the
5 hook, emails popping in every minute not just to me, but to the
6 staff, the School of Communication, my own assistant in the
7 communications office, and many of the communications were
8 actually very emotional. People were very angry, offended, and
9 some of them sounded as if they were very much critiquing Dr.
10 Tracy in a way that was less than rational.

11 I was anxious because he was teaching courses, his
12 schedule was publicly available, anybody could find out where
13 he was when he was teaching.

14 I was concerned that this could inspire someone with a
15 kind of a vengeance or desire to hurt to perhaps come on campus
16 and cause disruption. So, I was very concerned for the safety
17 of our students and for Dr. Tracy's own safety as well as his
18 family. His wife works on campus, he has young kids, you get
19 very concerned when you see that level of anger coming in in
20 the volume that it came in.

21 *BY MR. CURLEY:*

22 *Q.* On the front page of the notes -- well, you mentioned his
23 wife. What does she do for the university?

24 *A.* She works in the library. I don't know her exact title.

25 *Q.* As far as you know, is she still there?

1 A. As far as I know, she is still there.

2 Q. There was an email where you were emailing about her to her
3 supervisor. Could you explain what that was about?

4 A. So, that would have been in January 2016. Dr. Tracy's wife
5 has an excellent reputation and is seen to be an excellent
6 employee. That was clearly a friendly overture to the dean of
7 the libraries, how is she doing today. I knew that would be a
8 difficult day for the family, the day Dr. Tracy is terminated,
9 was his wife doing okay. It was genuine concern.

10 Q. Do you remember getting any response?

11 A. I just saw the email.

12 I believe the dean indicated that maybe we could talk
13 later, but I don't think it was about that. So, no, I didn't
14 hear anything about how Dr. Tracy's wife was doing.

15 Q. Back to the notes that you have here. Do you have those in
16 front of you?

17 A. Yes.

18 Q. On the front page there were some notes on here that we
19 haven't talked about yet.

20 The first one I want to ask you about it says, "anything
21 vaguely threatening - copy Larry and Charles Lowe." Who is
22 that?

23 A. Larry Glick was the associate general counsel in the
24 university attorney's office, and Charles Lowe was the Chief of
25 Police for FAU Police.

1 Q. The next comment mentions death threats. What is that
2 about?

3 A. As best I recall, there is a website, bobmillerwrites.com,
4 I think it was a person by the name of Bob Miller who
5 established this website, and I believe he had written
6 something that made death threats to Dr. Tracy, to the best I
7 remember. We were concerned about things like that.

8 Q. When you met with Professor Tracy on the 18th, did you talk
9 about his safety and concerns about that with him?

10 A. I let him know I was concerned and wanted to know how he
11 was doing.

12 Q. How did he respond?

13 A. Pretty calm, didn't seem particularly concerned.

14 Q. Did that surprise you?

15 A. Yes, that surprised me. He has young children at home.
16 This kind of unleashed a lot of anger from the public. I
17 expected him to be much more concerned. I thought maybe he
18 would ask for police protection, but he didn't.

19 Q. At some time was there police protection on campus?

20 A. Yes, I requested it for the college and other officers
21 requested it.

22 Q. How long was there police on campus to deal with this?

23 A. I believe the duration of that semester I asked for a
24 police car to be outside our building. I believe that is the
25 correct time frame.

1 Q. Going to the third page of your notes, you were asked
2 about -- your first comment was your objectives and it was --
3 you explained the comment regarding potential misconduct, and
4 the question that you have there is when was the disclaimer put
5 on. Did you talk to him about that?

6 A. Yes, we did discuss that.

7 Q. Okay. And the next comment is he needs to know of the
8 fallout and impact. What does that mean?

9 A. I thought it was important for him to recognize the scope
10 of how the university was being impacted by his writings.

11 Q. And why did you feel like he needed to be aware of that?

12 A. Well, aside from the statement considerations, and the
13 threat, he needed to understand that the university was seen as
14 supporting and sponsoring his writings. That was important for
15 us to discuss and for him to understand to distance his own
16 writings from his position at the university.

17 Q. The next is Global Research as part of the research
18 assignment. What is that about?

19 A. So, his postings on the Global Research website we believed
20 were part of his annual assignment and part of the research
21 assignment he had for the year, but we were still discussing
22 that, and I wanted to discuss that with him when we met. If it
23 was not to be part of the assignment, we would need an
24 appropriate disclaimer. If it was part of the assignment, it
25 would be evaluated by the supervisor according to the standards

1 of that specialization of study.

2 Q. Okay. And you did in fact discuss Global Research and
3 research assignments when you met?

4 A. Yes.

5 Q. Tell us about that discussion.

6 A. So, there was an email between Dr. Tracy and his supervisor
7 at the time indicating the kinds of research projects he was
8 working on for that year, and he indicated that these projects
9 that were on Global Research were part of the research
10 assignment.

11 That was clarified and I confirmed that in the summary
12 letter I sent him following the discussion.

13 Q. Okay. So, he previously suggested that it was something
14 that was part of his research, and what did he tell you at the
15 meeting?

16 A. Honestly, and I see -- can I see the summary of the meeting
17 again so I can remember what we discussed?

18 Q. Sure. This is Defendant's 15. All right?

19 A. Yes.

20 Q. And does that refresh your memory?

21 A. Yes, it does. Thank you.

22 Q. And what did he have to say?

23 A. At that meeting, Dr. Tracy said that his Global Research
24 would not be part of his assignment and sent the email
25 indicating that these were part of the research activities, and

1 I confirmed in the memo that these particular publications
2 would be considered part of the assignment and would be
3 evaluated accordingly.

4 Q. I see. Okay. Let me hand you what is Defendant's 16,
5 which is his response to this memo you sent.

6 Put 16 up.

7 What does he have to say about his response to you?

8 A. So, the fifth paragraph discusses the Global Research
9 article that he published. He disputes my determination and
10 says that the articles that are published on Global Research do
11 not constitute part of his scholarly research activities for
12 the year.

13 Q. So, he didn't suggest to you that some of the research
14 on -- for Global Research should have been something he should
15 have disclosed, right?

16 A. It's a little bit unclear. He says he writes articles on
17 the personal blog, some get shared on the Global Research site,
18 and he constitutes -- or he states that these do not constitute
19 part of the Global Research assignment. I don't know if that
20 is your question.

21 Q. That was it.

22 Now let's put up Defendant's 14. Start with "I met." I
23 want to ask you about this. Would you read that for a minute
24 and I want to ask you a question about it.

25 A. All right.

1 Q. Did he tell you any of those things?

2 A. No.

3 Q. Where he says in here "may inform some of my research and
4 teaching so I am uncertain whether I should fill out a form for
5 the activity ex post facto, especially since it might give them
6 reason to take disciplinary action," etc., etc. Did he talk
7 about any of that with you?

8 A. No.

9 Q. Did he mention that in his letter which he wrote shortly
10 after this email?

11 A. No.

12 Q. Okay. This email he wrote is to some guy named Mikey, and
13 it is on a non FAU email. Did he share that with you?

14 A. No.

15 Q. Okay. So, during the course of the meeting, or in his
16 letter afterwards, he never acknowledged to you that there
17 might be a disclosure that is required here and he may have
18 committed a violation?

19 A. No, he did not.

20 Q. Okay. Was your point in meeting with him to bring a lot of
21 these things to his attention and communicate with him about
22 what was going on and what the expectations of the school are?

23 A. Yes, that was the point of the meeting.

24 Q. Did you feel like you communicated those things to him?
25 Was there anything you wanted to say that you didn't say to

1 him?

2 A. No. I said everything I felt needed to be said.

3 Q. In that meeting, did he ask any questions of you that you
4 were unable to respond to?

5 A. No.

6 Q. And he had his union representative with him, didn't he?

7 A. Yes, he did.

8 Q. I want to go over the notes. We will go back to these
9 letters in a second.

10 In the notes, the next page, page four, it mentions "we
11 don't police people's private lives." Do you see that?

12 A. Yes, I do.

13 Q. Do you know what you were referring to there?

14 A. Knowing my, again, idiosyncratic style of taking notes, the
15 fact that there is space around that sounds like there would
16 have been conversation flowing after the previous line and
17 perhaps somebody said something like, you know, we are not
18 about policing private lives, and I jotted that down.

19 Q. You heard during the trial the reference to an honor
20 system. Do you know anything about that?

21 A. Yes.

22 Q. Could you tell the jury how that works at FAU?

23 A. So, faculty are afforded quite a bit of leeway in how they
24 do their job, but there are certain responsibilities that they
25 are expected to comply with. Mostly, we trust that they are

1 going to do that.

2 The expectations are laid out in the collective bargaining
3 agreement and handbook and other hiring and HR documents, we
4 trust faculty to comply. You don't police faculty, you don't
5 call them up, have you done this, here is a reminder, here is a
6 reminder. We expect faculty, who are highly skilled people, to
7 take the responsibility to do what they are supposed to do.

8 That is the honor system, we trust you to do your job.

9 Q. Let's talk about outside activities for a minute. How does
10 the honor system relate to someone checking the box and filling
11 out the forms? How does that work?

12 A. So, faculty are required, when they go in and fill out
13 their annual assignment, to look at the pop-up box about
14 outside activities, and that box says, I acknowledge if I have
15 outside activities, I will fill out the reporting form.

16 It is up to the faculty member to decide if they have
17 activities like that. It is up to the faculty member to report
18 anything they may think meets that kind of category and then
19 they fill out the form. If there is any question, they discuss
20 it with their supervisor.

21 The pop-up box simply affirms that they are aware they have
22 the obligation to fill out those forms.

23 Q. 81. Sorry.

24 This is the box that Professor Tracey was, I will say,
25 reluctant to check?

1 A. Correct.

2 Q. And the honor system in connection with checking the box,
3 how does that work?

4 A. Well, faculty, by reading this statement, understand that
5 the requirement is outlined in the documents, the form is
6 available on the links, that they need to report any outside
7 activity as required.

8 Q. Do you still have the January 28th memo there?

9 A. Yes.

10 Q. Of 2013?

11 A. Yes.

12 Q. What is the exhibit number for that?

13 A. 15.

14 Q. In Exhibit 15 -- we heard a lot about not asking Professor
15 Tracy to report his blog.

16 Can you tell the jury whether you asked him to do that and
17 then put it in writing?

18 A. We discussed it at the meeting and in this memo I
19 reiterated the fact that the disclaimer requirement was
20 necessary when writing on his blog and listing his affiliation
21 with the university. That was made very clear to him, it is in
22 the policy documents as well.

23 Q. Here it says, "I asked you whether or not you completed and
24 filed the report of outside activity form. You replied you had
25 not." You told him he should, correct?

1 A. Correct.

2 Q. At the meeting, did he tell you no?

3 A. No.

4 Q. It was only later when he wrote back and said he didn't
5 think he had to, right?

6 A. Correct.

7 Q. So, when he writes to you and says he didn't think that he
8 had to, you are on an honor system, right?

9 A. Correct.

10 Q. Did you accept his representation?

11 A. No.

12 Q. What did you do?

13 A. I reviewed what he had done, I discussed it with Dr.
14 Alperin, and after further review and after receiving other
15 information from him about his blog, I issued him a Notice of
16 Discipline.

17 Q. The Notice of Discipline had to do with the disclaimer
18 issue?

19 A. Correct.

20 Q. And let's go back to 114, if we could, please, Defendant's,
21 middle paragraph.

22 When you met with him, did he tell you this?

23 A. Um-m-m, I remember asking him when he put the disclaimer on
24 the blog. He didn't say anything about having trouble
25 verifying.

1 Q. In fact, he wrote to you a few days later and sort of
2 chastised you for that, right?

3 A. Correct.

4 MR. CURLEY: Now is a pretty good breaking point, your
5 Honor.

6 THE COURT: Okay. We took a long break, we just got
7 back at 11:36. I was going to let you go a little longer. Do
8 you have another discrete area to cover?

9 MR. CURLEY: I can. Let me know when you are ready.

10 THE COURT: Thanks.

11 BY MR. CURLEY:

12 Q. Going back to your notes, page four, there is a comment
13 that says, "a blog can look like academic work, but we have
14 procedures and reviews at many levels, vetting - not appearance
15 of schol., but is real schol."

16 What is that a reference to?

17 A. It looks like the discussion had led into what blogs look
18 like and what they can look like and how a blog could be
19 academic or could not be academic.

20 It seemed mostly what I was writing about is that if it is
21 scholarly, it needs to meet the standards of particular
22 disciplinary organizations, that there are ways to review the
23 quality and standards of scholarly work.

24 Q. Did you talk about that in your meeting with him?

25 A. About vetting --

1 Q. Levels of review.

2 A. The levels of review?

3 Q. Yes.

4 A. We talked about whether or not his Global Research articles
5 would meet the standards of his academic discipline. It was
6 implied in that that we were talking about meeting the
7 standards and undergoing review.

8 Q. What was the issue that you discussed with him about the
9 disclaimer?

10 A. So, on the memoryhole blog, the pages that included his
11 articles at that time did not post a disclaimer, and this was
12 the problem because people reading those articles were making
13 assumptions that this writing was affiliated --

14 MR. LEO: Objection, calls for speculation.

15 THE COURT: I will sustain. You can redirect the
16 witness.

17 MR. CURLEY: Sure.

18 BY MR. CURLEY:

19 Q. When you met with Dr. Tracy, did you explain to him what
20 you thought was the concern about the disclaimer not appearing
21 in the articles themselves?

22 A. Yes, I did.

23 Q. What did you tell him?

24 A. Not having a disclaimer could allow a perception that FAU
25 was sponsoring or affiliated with his opinions in the articles.

1 Q. So, if a member of the public clicked into the article, did
2 they see a disclaimer?

3 A. No.

4 Q. Why not?

5 A. It wasn't posted there.

6 Q. If they were interested in reading an article that
7 Professor Tracy posted and went to the article instead of
8 spending time on the home page they wouldn't see a disclaimer,
9 right?

10 A. That's correct.

11 MR. LEO: Objection, calls for speculation.

12 THE COURT: You can rephrase it.

13 BY MR. CURLEY:

14 Q. The articles did not have the disclaimers?

15 A. That is correct.

16 Q. One looking at the article cannot see the disclaimer that
17 is not there, right?

18 MR. LEO: Objection, speculation.

19 THE COURT: Overruled.

20 THE WITNESS: When I looked at the article, I did not
21 see the disclaimer there.

22 BY MR. CURLEY:

23 Q. Was it a concern that all of these people were attributing
24 the articles and the things on the blog to the school?

25 A. Yes, they were attributing what he said to FAU.

1 Q. What were you asking Professor Tracy to do to try to stop
2 people from believing the school was sponsoring his Sandy Hook
3 articles and all the other things he was writing on his blog?

4 A. I asked him to appropriately and thoroughly post
5 disclaimers on each of his articles.

6 Q. What you asked him to do, is that something the collective
7 bargaining agreement requires him to do?

8 A. Yes.

9 Q. Pull up Exhibit 1. Start with 19.7, if you could.

10 Do you see the section that I brought to your attention
11 here?

12 A. Yes, I do.

13 Q. And what were you asking Professor Tracy to do and how
14 would that meet the requirements of 19.7?

15 A. I was asking him to take what is called here as reasonable
16 precautions to ensure that external folks understand that the
17 employee is engaging in activity as a private citizen and not
18 an agent or spokesperson of the university. I was asking him
19 to comply with this provision of the CBA.

20 Q. In your mind, did you think it was reasonable to put the
21 disclaimer on each of the pages of the articles as well as just
22 his home page?

23 A. I thought it was very reasonable. He could write anything
24 he wanted to write, he just needed to post the appropriate
25 disclaimer.

1 Q. Your thought is that would help to avoid confusion in the
2 public's mind about who was his sponsor?

3 A. Yes, and fully comply with the CBA.

4 Q. How did that go over with Professor Tracy?

5 A. Not very well.

6 Q. Would you tell the jury how that went?

7 A. Well, after I sent the summary of the meeting and he sent
8 the letter back arguing that he did not need to do this, and I
9 sent the Notice of Discipline, he filed a grievance, so he was
10 very resistant to this.

11 Q. What prompted the Notice of Discipline? That came about a
12 month and a half later, right?

13 A. He had sent some links from his blog to Dr. Alperin which I
14 believe were copied to me, including links to some articles
15 that continually referenced his position at FAU, and in fact
16 one of the articles was entitled An Open Letter to FAU
17 Administrators. There were three or four articles that FAU
18 continued to be referenced in, and I was named, Dr. Alperin was
19 named, so it seemed to me there was no reasonable effort on his
20 part to separate his opinions from FAU.

21 Q. Let me hand you one of those articles, 231-A.

22 THE COURT: Defense?

23 MR. CURLEY: Yes, your Honor.

24 BY MR. CURLEY:

25 Q. 231, in fact, it is addressed to you?

1 A. Correct.

2 Q. And he posted this on his blog?

3 A. Yes.

4 Q. Is there a disclaimer in here somewhere?

5 A. No.

6 Q. Let me know when you see it. Don't go too far, guys. We
7 have a redacted version.

8 You didn't see this disclaimer, right?

9 A. No.

10 Q. And you said there were other things like that?

11 A. Yes.

12 Q. So, that is when you issued the disciplinary notice?

13 A. Correct.

14 Q. And your concern was that he hadn't taken seriously the
15 request by the school to avoid the appearance that the school
16 is sponsoring his research?

17 A. Correct. It felt disingenuous, felt like he was
18 continually trying to get FAU mentioned on his blog.

19 Q. Did he use his personal name or an alias or pen name or
20 anything other than Professor Tracy, FAU?

21 A. He could have done that, he could have said here is an
22 article by James Tracy, but FAU continued to be referenced, and
23 that is where we were having a problem.

24 Q. On cross-examination, you were asked about comments made by
25 professors to the newspaper in December 2013. Do you recall

1 that?

2 A. Yes.

3 Q. And there were three of them, we could look at it, but as I
4 recall, none of them refer to themselves as professors or
5 affiliated with FAU, right?

6 MR. LEO: Objection, mischaracterization. Counsel is
7 testifying.

8 MR. CURLEY: Fine.

9 MR. LEO: Best evidence.

10 THE COURT: You did say on cross-examination. It was
11 on direct examination.

12 MR. CURLEY: Thank you, your Honor, thanks.

13 I will find it on the break. I don't want to take up
14 the jury's time. Thank you. Plaintiff's 9.

15 THE COURT: That is marked at this point.

16 MR. CURLEY: It is not in evidence?

17 THE COURT: I have Plaintiff's 9 as marked. I just
18 have it as marked.

19 MR. CURLEY: All right, your Honor, I will look at it
20 on a break, I will talk to counsel. I apologize.

21 THE COURT: All right.

22 BY MR. CURLEY:

23 Q. Suffice it to say when writing personal things in the
24 newspaper, or otherwise, what they are supposed to do is just
25 say it in their personal name and not refer to the school,

1 right?

2 A. Correct.

3 Q. Let's go to --

4 MR. CURLEY: Your Honor --

5 THE COURT: Is this a good breaking point?

6 MR. CURLEY: Yes. I would like to put this up on the
7 screen so the jury can see it. We are having a technical issue
8 here.

9 THE COURT: All right. It is 12:15, we will take our
10 lunch break and we will be in break for one hour. I ask the
11 witness to -- remind you that you are under oath, do not
12 discuss your testimony with anyone.

13 I remind the jurors not to have any contact with
14 anyone associated with the case, do not discuss the case, and
15 we will see you back in one hour, at 1:15.

16 *(Thereupon, the jury leaves the courtroom.)*

17 THE COURT: Okay, do we have to address any matters,
18 or just technology issues?

19 MR. CURLEY: It is a technology issue.

20 THE COURT: Okay, we will be back in an hour.

21 *(Thereupon, a short recess was taken.)*

22 THE COURT: Okay, welcome back. Our witness can
23 resume the stand.

24 Our jurors are all here. We can bring them in?

25 MR. CURLEY: Yes, your Honor, by all means.

1 (Thereupon, the jury returned to the courtroom).

2 *THE COURT:* Welcome back, everyone, you may be seated.

3 The witness is on the stand subject to
4 cross-examination. Counsel may proceed.

5 *MR. CURLEY:* Before the break we were trying to put
6 231-A up. Put that up, please. Scroll through it for a
7 second. Scroll to Professor Tracy's comments. Scroll to
8 professor Tracy's comments. All right. Then go back now to
9 see what we have. Go back to the front page, if you would.

10 *BY MR. CURLEY:*

11 *Q.* Okay, we talked about this before, I have Exhibit 15 there.
12 Do you see that?

13 *A.* Yes.

14 *Q.* Go back and forth to 2/15, if you would.

15 What is the date of the meeting you had with Professor
16 Tracy when you talk about not putting FAU into his blog?

17 *A.* January 18, 2013.

18 *Q.* You met with him on the 18th?

19 *A.* Yes, we met with him on the 18th.

20 *Q.* All right. Let's go back to 231-A. Do you see the date
21 that this was received?

22 *A.* Yes, January 22nd.

23 *Q.* Four days later?

24 *A.* Right.

25 *Q.* And this is an open letter to FAU administration by a

1 filmmaker and addressed to you, right?

2 A. Correct.

3 Q. And Vice Provost Alperin?

4 A. Right.

5 Q. I take it this is not what you had in mind?

6 A. No.

7 Q. Hopefully we solved our technical glitches. Let's go to
8 the notes if we could, that is Plaintiff's Exhibit 2-A. All
9 right. Let's go to the last page of the notes if we could,
10 please.

11 Do you have them there?

12 A. Yes, I do.

13 Q. Okay. Can you tell the jury what they are looking at now?

14 A. These were notes I had written for myself to refer to
15 during the meeting as to the process, what I wanted to ask him
16 and discuss with him.

17 Q. You said these are notes you wrote yourself. Some of them
18 are typed, some of them are handwritten. What is the
19 difference?

20 A. The typed notes I wrote for myself prior to the meeting. I
21 believe the handwritten notes were what I added to this after
22 the meeting to basically answer some of the questions that came
23 up in the meeting.

24 Q. Okay. If you would, walk us through what you have here and
25 explain your notes and what happened during the meeting.

1 A. Okay. This was a first such meeting I had with the
2 members, this is why I wanted notes to prompt myself through
3 the meeting. I started by reminding myself my role would be to
4 ask questions of Dr. Tracy and clarify points from the
5 university's perspective that we were not going to discuss
6 speech. We were speaking about matters of policy.

7 We have some specific questions and issues brought up that
8 I wanted to talk about with him.

9 The first question was, I wanted to know from him when the
10 disclaimer was posted on the memoryhole blog. That was the
11 question I asked him, and it looks to me like the answer was
12 between March and April 2012.

13 Q. Okay.

14 A. That came later.

15 Q. All right.

16 A. The next thing discussed was the activity with relation to
17 the Global Research website. I planned to ask if he considered
18 this as part of the research activity. There was no disclaimer
19 on the articles, did he see this as part of the FAU activity or
20 not. Was it related to his research? And based on the email
21 he sent to Noemi Marin -- NM would refer to Noemi Marin, the
22 director -- based on that email, this is part of his research
23 activity.

24 You see I scratched out "do you consider," and the
25 handwritten note under that is therefore it "will be

1 evaluated."

2 The next point is, you know, do you see any conflict of
3 interest in this work, can you explain that, have you done the
4 report of outside activity forms? If you did not submit the
5 forms, why not?

6 I wanted to know if he understood the impact that hit the
7 university as a result of his blogs. DA after that reminds me
8 that Diane Alperin did that part of the discussion, and the
9 meeting was to end with safety concerns and perceived threat or
10 possible threat to him, to faculty and students.

11 He had posted on his blog that Anderson Cooper -- AC stands
12 for Anderson Cooper -- was out to harm you. It was posted that
13 he felt threatened by Anderson Cooper and CNN wanted to
14 interview him. I was concerned for his safety.

15 And then handwritten under there is a further question that
16 we probably discussed which was, what are your plans to
17 continue with this work, because if you are going to continue
18 this, we just want to be prepared so we can plan our response
19 for the university.

20 Q. All right. Plan in what sense?

21 A. If we are going to continue to receive such a high volume
22 of feedback from the community, we need to have a way of
23 managing that. If we are going to continue to receive things,
24 communications, threatening, we wanted a plan for handling
25 that.

1 Q. Do you have responsibilities to the faculty and students to
2 protect their safety as well?

3 A. Absolutely. We have a police service at the university,
4 but it is my responsibility to make sure there is full
5 discussion among the university officials to take care of any
6 potential problems.

7 Q. All right. I think that is where the notes end, right?

8 A. Yes.

9 Q. Okay. Let's go to -- I want to ask you about some of the
10 exhibits that you were shown this morning now that we have
11 them. Let's try 38-Q.

12 Okay. Do you remember -- this is 38-Q. Do you remember
13 seeing it this morning?

14 A. Yes.

15 Q. Okay. Can you explain to the jury what this is about?

16 A. I received an email from a person named Misty Fitch, I
17 don't see the full text of that email here, basically
18 expressing a lot of concern about the opinions Dr. Tracy
19 expressed, expressing -- again, I don't see it -- anger and
20 dismay at the university for --

21 Q. You don't have the document there?

22 A. I can see the first page, I don't see it all.

23 MR. CURLEY: One moment, your Honor, I'm sorry.

24 BY MR. CURLEY:

25 Q. Okay, ignore my scribble.

1 If you would, walk us through the pages and tell us as you
2 are going through the pages since we now have the complete
3 exhibit.

4 A. So, the first page is an email from a woman named Misty
5 Fitch, dated December 11, 2015, in which she was writing me to
6 express her feelings about Dr. Tracy and his writings. She
7 says she is a resident of Connecticut directly affected by the
8 Sandy Hook school shooting, and she is asserting this
9 professor, Dr. Tracy, who represents our university, is
10 continuously harassing loved ones.

11 That goes on to say she supports free speech, she is
12 unhappy with Dr. Tracy's continued employment and she requests
13 we take into consideration his behavior outside the classroom
14 and reflect on the message you want your university to send to
15 the public.

16 That is the email I received from her.

17 Q. Did you distribute that to anyone else or what did you do
18 with it?

19 A. Yes, I forwarded this.

20 Q. Why?

21 A. Well, this concerned me, that there was a report that a
22 faculty member, specifically Dr. Tracy, may be harassing or
23 stalking somebody in the community, so I wanted to let Dr.
24 Alperin know. She was my supervisor.

25 Q. We heard that you looked into it, or tried to look into it

1 to see if there was some validity to it?

2 A. Yes, I wrote her back that same afternoon asking her, if
3 possible, to provide me with more information and then I didn't
4 hear back for a few days.

5 Q. And what happened?

6 A. I then, I guess four days later, wrote her again because I
7 wasn't sure if she had received my email.

8 I resent it, I wanted to reach out to her. I asked her if
9 she preferred to phone me, call me, and that was it. I never
10 heard back from her.

11 Q. And was that the end of it or is there something beyond
12 that?

13 A. I'm incorrect, I did hear back from her. Sorry, I am
14 incorrect. She indicated she was going to forward my
15 information, my phone number and email to the families who were
16 affected and that they would contact me directly, and she said
17 she appreciated my attention to this.

18 Q. Okay. Did you hear anything from the families?

19 A. No, I did not.

20 Q. Okay. And was that the end of your investigation or did
21 you do more?

22 A. Um-m-m, I don't believe I did more in terms of Misty Fitch,
23 no.

24 Q. That was the end of the Misty Fitch incident?

25 A. Correct.

1 Q. All right. Let's look at Exhibit 85. That is the one with
2 your drink on it, your drink on it and the lady. Let's go to
3 the next page.

4 Who is Lisa Metcalf?

5 A. She is the university spokesperson.

6 Q. When you say spokesperson, is she someone that follows the
7 news and things like that, that is her job?

8 A. Absolutely, that is her job, to coordinate any reporting
9 about FAU, whether it is negative, positive, coordinate that
10 and make sure the Division of Media Affairs and Communication
11 is aware of all media postings about FAU.

12 Q. And when media is buzzing over Sandy Hook or Professor
13 Tracy, how does that affect her job?

14 A. She got inundated, she was inundated with communications.
15 She was the person I sent all of the emails I received to, so
16 she could have them collected in one place.

17 Q. Is that what you were supposed to do?

18 A. That is what she wanted us to do, she wanted to gather all
19 the information together to have a full understanding of what
20 was happening.

21 Q. Her job was to assemble that information and deal with it
22 on behalf of the university?

23 A. I believe so, yes.

24 Q. When you wrote to her, having a nice day, what did you mean
25 by that?

1 A. A little sarcastic, humorous, you know, basically, it is
2 going to be a rough day.

3 Q. Okay. And then the drink on the next page, what is that
4 about?

5 A. Well, when I said are you having a nice day, she sent a
6 picture of a woman at the beach to indicate I wish I were at
7 the beach. That is how I took it. I sent back another image,
8 yep, let's have a drink with lemon in it, a message of support.

9 Q. Was that a shot at Professor Tracy?

10 A. Not at all, it was a communication, kind of friendly and
11 jokey, with Lisa Metcalf.

12 Q. Plaintiff's 37-B, please.

13 Do you remember this one?

14 A. Yes.

15 Q. It ends by saying, "While it might be legal and protected
16 speech, there is a level of callousness that beggars belief,
17 and I feel that Florida Atlantic University should address
18 this, even if it is to disclaim any responsibility for his
19 words, as he is using his title to sell books on the subject."

20 At this point in time, did you know he was selling a book?

21 A. No. This is the first I heard of that.

22 Q. This is how you came to find out about the book?

23 A. That's right.

24 Q. He hadn't told you?

25 A. Nope.

1 Q. You have a table full of emails over there, no emails about
2 him writing a book?

3 A. No.

4 MR. LEO: Objection.

5 THE COURT: What is the basis for the objection?

6 MR. LEO: Your Honor, calls for speculation what is on
7 the table over there.

8 THE COURT: Well, I think the question had to do with
9 whether there was any notification about the book.

10 Maybe you want to rephrase the question.

11 BY MR. CURLEY:

12 Q. He didn't tell you about the book, did he?

13 A. No, he did not.

14 Q. So, here you find out there might be a book out there.
15 What did you do about that?

16 A. Well, as I usually did, forwarded that to Dr. Alperin. I
17 knew I needed to let her know about this, and I copied two
18 other people.

19 Q. So, this is -- let's see the date here -- December 14,
20 2015?

21 A. Yes.

22 Q. Refresh my memory, when did he send in his outside
23 activities forms?

24 A. He had not sent them in at this point.

25 Q. A day later?

1 A. That's right.

2 Q. Anything about the book?

3 A. I had no idea about the book.

4 Q. We see your email here, right? That is your email to
5 Professor Tracy, right?

6 A. Yes. That is my email giving him another chance to comply.

7 Q. And in the email you say, "I must receive complete and
8 accurate outside activities reports," right?

9 A. Yes.

10 Q. And, let's see, the book email you get is December 14th, it
11 looks like you got about three -- got it about 3:00 -- almost
12 4:00 o'clock, running up on it.

13 Okay. Let's go to -- let's see what Professor Tracy sent
14 you. Go to the front page. Yep, okay. Let's see what is
15 attached.

16 These are the forms that were submitted, we'll cover these
17 in more detail. Suffice to say nothing about the book, right?

18 A. There is no mention of the book. He mentions articles and
19 available research, I believe there is one on a radio podcast,
20 no mention of the book.

21 Q. No mention of receiving any money or compensation?

22 A. No.

23 Q. All right. So, let's go back to 37-B. Plaintiffs 37-B, is
24 this it? Okay, thanks.

25 You sent this on to Dr. Alperin; is that what you said?

1 A. Yes.

2 Q. And what did she do with it?

3 A. I believe she reviewed it.

4 Q. All right. Did you -- did there come a point in time when
5 a letter was sent to Dr. Tracy asking for some information on
6 the book?

7 A. Can I see what you've got?

8 Q. You can. Exhibit 78.

9 A. Yes.

10 Q. Next page, please.

11 This letter was copied to you, but it was signed by the
12 Vice Provost, correct?

13 A. That is correct.

14 Q. Who is it that made the final decision about Professor
15 Tracy's termination?

16 A. Dr. Alperin.

17 Q. It wasn't you?

18 A. No.

19 Q. What was your role in your decision to terminate his
20 employment?

21 A. Um-m-m, I had made a recommendation that he should be --
22 there should be further consequences because of his lack of
23 willingness to comply with what we are asking.

24 Q. I want to stay with this for a minute, but do you remember
25 whether the draft letter you sent recommended termination or --

1 A. I remember wondering if the process included yet another
2 reprimand.

3 I wasn't familiar enough with the process, that is the
4 first time I had gone through something like this at that
5 point, so I wasn't sure if there was another reprimand in order
6 or termination would be in order. That is not my decision to
7 make.

8 Q. Whose decision was it to make?

9 A. Dr. Alperin.

10 Q. And she made the decision, right?

11 A. Yes, she did.

12 Q. Let's go to page one of this letter, please.

13 Is this the first time you are aware of someone writing to
14 Professor Tracy and asking him a question about the book that
15 he didn't disclose?

16 A. I believe so. I don't think we knew about the book until
17 right before that holiday break.

18 Q. Right.

19 A. So, we didn't know to ask him about it because we didn't
20 know about it.

21 Q. Well, that brings up another subject.

22 When you are talking about outside activities, is the
23 protocol that the faculty member employee is supposed to raise
24 the topic, and then you can talk about it?

25 A. That is right. Faculty does have the responsibility to

1 raise the topic, fill out the form and report it. Then, if
2 there is any perceived conflict the supervisor and faculty can
3 go through it.

4 Q. The collective bargaining agreement, Section 1, 19.4, I
5 think. Right there on the corner of the desk. 3.

6 Does that lay out the process?

7 A. Yes, this lays out the process.

8 Q. Conflicts of interest prohibited. Conflicts of interest
9 are prohibited and employees -- that would be Professor Tracy?

10 A. Yes.

11 Q. -- are responsible for resolving them by working with their
12 supervisors -- that would be you?

13 A. Correct.

14 Q. -- and other university officials. How can you work
15 through the book issues and payment issues if he doesn't tell
16 you about it?

17 A. Exactly.

18 Q. Let's go back to Exhibit 78, please.

19 Any response to that you are aware of?

20 A. You mean from Dr. Tracy?

21 Q. Of course.

22 A. Not that I am aware of. He did not respond.

23 Q. Okay. Plaintiff's 31. You touched on this briefly, you
24 were asked questions about this. For the record, this is
25 Plaintiff's 31. If you could highlight -- keep going down,

1 next paragraph, that paragraph there.

2 I just asked you, he wants -- it sounds like he wants the
3 administration to give him some sort of license that he doesn't
4 need to tell anybody anything.

5 How could you respond to this without knowing what he is
6 talking about? Can you explain that?

7 A. Well --

8 MR. LEO: Objection, counsel is testifying.

9 THE COURT: I'll sustain as to the first part of the
10 question, overrule as to the second.

11 BY MR. CURLEY:

12 Q. Did you read this, and what did you do in response to it?

13 A. Um-m-m, this is putting everything backwards.

14 You can't ask to have a determination made on what your
15 outside activity is if you haven't told us what your outside
16 activity is. I believe he was asking for some sort of a waiver
17 or approval prior to reporting his outside activities. That is
18 backwards.

19 Q. Defendant's 80, please.

20 Do you see this? This is an assignment sheet, and he
21 signed it, right? This is the handwritten one?

22 A. Correct. Yes, this is the handwritten assignment.

23 Q. So, he offered you that. Why wasn't that good enough?

24 A. The requirement is that faculty sign their assignments on
25 the FAIR system and the FAIR system requires them to click off

1 the pop-up box acknowledging they are aware of the outside
2 activity form.

3 He is giving us a paper version, not doing it online that
4 is required. He gives us a paper version that does not mention
5 outside activity involvement.

6 Q. Nothing about outside activities, compensation, research,
7 anything like that?

8 A. Correct.

9 Q. But he offered this?

10 A. He offered this. This does not give the whole picture of
11 what he was doing. We knew he had outside activities so he was
12 not complying with the --

13 Q. Did there come a time you were suspicious about Professor
14 Tracy and said, hey, what is going on?

15 A. Throughout that fall, when he was not answering questions,
16 I did wonder, is he trying to hide something, is he doing
17 something that -- is he deliberately doing something he does
18 not want us to find out? He was refusing to do certain things,
19 quibbling with some of the language in his supervisors' emails.
20 It would have been easier if he said I am writing a book.

21 Q. Did anybody else refuse to click the box?

22 A. No.

23 Q. Did anybody else refuse to submit the forms when asked?

24 A. There was one other faculty member that refused to submit
25 forms.

1 Q. Who was that?

2 A. There is a faculty member named Sherry Copeland that same
3 semester.

4 Q. What happened with Ms. Copeland?

5 A. So, Ms. Copeland had an assignment to teach, I believe,
6 four classes for us.

7 As the semester progressed, her chair received complaints
8 from students who were going to meet with her in office hours
9 and she wasn't there. The chair became suspicious, and did a
10 Google search and found out Ms. Copeland was teaching I think
11 11 other courses at a whole bunch of other institutions.

12 Clearly she was way exceeding her assignment and she had not
13 filled out outside activity forms. We asked her to do so.

14 Q. I thought you said -- I remember in your notes you said you
15 don't police outside activities. Why were you Google searching
16 this lady?

17 A. This was hurting our students, the students needed access
18 to the faculty member who wasn't responding to them. We needed
19 to know why.

20 Q. And you said you thought she was teaching somewhere?

21 A. Yes.

22 Q. And that is when you looked into it?

23 A. I didn't personally, but, yes, it was looked into.

24 Q. Sort of like a book that was referenced?

25 A. If you hear about it, you have to investigate what is

1 happening. If this is negative to our students, this is a
2 problem.

3 Q. Let's go to the last page. You haven't looked at that yet.

4 MR. CURLEY: Excuse me one moment. Sorry, your Honor.

5 THE COURT: That is okay.

6 BY MR. CURLEY:

7 Q. Do you recognize this?

8 A. Yes, I do.

9 Q. What is this?

10 A. This is a notice of proposed discipline, termination for
11 Ms. Copeland.

12 Q. We heard Ms. Copeland tried to resign.

13 A. That's right, she tried to resign, making her final date
14 earlier -- I'm sorry, later in December, and I didn't think
15 that was appropriate.

16 Q. Why not?

17 A. I didn't think she should continue to earn salary when she
18 had been so negligent and ready to be terminated when she did
19 not comply.

20 Q. This is December 15, 2015, right?

21 A. That is right, that is when I sent her the notice.

22 Q. Your decision was it was based on insubordination. Why
23 insubordination?

24 A. When she was first confronted about the outside activities,
25 she did fill out two outside activity forms or an outside

1 activity form that listed two outside activities, but we found
2 out she was engaged in many more activities she didn't
3 disclose. This was, frankly, insubordinate.

4 Q. Defendant's 24, please. Scroll down. Right where it says,
5 "I must receive complete and accurate outside activity
6 reports."

7 So, Mrs. Copeland didn't submit complete and accurate
8 activity reports, right?

9 A. That is correct.

10 Q. That is what you were asking Professor Tracy to do as well,
11 right?

12 A. That is correct.

13 Q. Did he?

14 A. He submitted some, but they were not complete.

15 Q. Let's look at Plaintiff's 33.

16 This is an email from David Williams to Professor Tracy,
17 right?

18 A. Yes.

19 Q. You were asked questions about his submitting forms in the
20 FAIR system. Do you see where it says, "I hope you will
21 reconsider and sign the assignment in the FAIR drop box"?

22 A. Yes.

23 Q. Is that what you were asking him to do?

24 A. That is all we wanted him to do.

25 Q. Do you think Professor Williams was clear enough with

1 Professor Tracy, or are there other words he could have used to
2 urge him to click the box and submit the form?

3 A. Possibly his language could have been stronger, but this is
4 his mode of communication and, to me, that would be pretty
5 clear. My supervisor said, I hope you do this.

6 Q. Let's go to 24 again, the second page.

7 How about where you say "this is not optional"?

8 A. It is pretty clear.

9 Q. And was it -- this your effort to get Professor Tracy to
10 comply?

11 A. Yes. He had been not complying and I wanted him to comply,
12 I wanted him to understand he needed to fill out the forms and
13 I was giving him this additional opportunity to do so.

14 Q. Why didn't you just fire him for speech?

15 A. I was not interested in his speech, that is not what this
16 is about. He was not fulfilling his obligations as a faculty
17 member and he kept pushing back on it. It didn't make sense.

18 Q. Plaintiff's 23. This is another document you were shown.
19 Plaintiff's 23, please.

20 Do you remember looking -- is it Professor Perry?

21 A. Dr. Perry, he is the Provost, you could call him Provost
22 Perry.

23 Q. Okay. Do you remember looking at this document?

24 A. Yes.

25 Q. At the bottom of the first page there, the last sentence,

1 last sentence, "if in doubt, reporting is the best practice."

2 How do you feel about that?

3 A. Well, we actually made it into a poem, if in doubt, fill it
4 out. If in doubt, fill out the forms.

5 Q. How long has that been kind of the mantra?

6 A. As long as I can remember, even when I was a faculty member
7 and not a dean, fill out the forms. When in doubt, fill it
8 out.

9 Q. Let's go to the last page, number one.

10 Is this what faculty members have always been urged to do?

11 A. Yes.

12 Q. Okay, thank you.

13 Exhibit 32-C, another document you were shown, I want to
14 make sure we understand what it is.

15 This is dated March 16, 2016. Let's look at the bottom
16 paragraph there.

17 Do you remember there being some issues of clarity that
18 was -- they were working on for division of research and what
19 that was about?

20 A. I wasn't really very aware of that, I don't have a great
21 deal of grant fund research in the college, or didn't have. I
22 was not aware of those details, but I was aware there were
23 considerable discussions about revising these requirements to
24 comply with the research needs and academic affairs needs.

25 Q. You are talking about Federally funded grants?

1 A. Yes.

2 Q. Did it have anything to do with Professor Tracy?

3 A. No.

4 Q. 38-G. Do you remember being shown this email?

5 A. Yes.

6 Q. Do you see where it says tenure is not immunity?

7 A. Yes.

8 Q. Is tenure immunity? Does that mean you can do anything you
9 want and nobody can do anything about it?

10 A. No.

11 Q. What does tenure get you?

12 A. So, tenure is one of the kind of pillars of academic life,
13 it provides you with the research freedom, teaching freedom,
14 ability and support to engage in research and discovery.

15 No, it is not immunity, you still need to meet your
16 responsibilities as a member of the faculty.

17 Q. Did you place any limits on Professor Tracy's speech or his
18 research?

19 A. Never.

20 Q. You didn't tell him to stop blogging and cut it off, none
21 of that stuff?

22 A. No. He had the freedom to do that.

23 Q. 38-O. Do you have 38-O in front of you? Let me grab that.

24 Here you go.

25 A. Thank you.

1 Q. Why don't we start at the bottom of the page.

2 It refers to an article he wrote about his termination of
3 employment. Do you see that?

4 A. "Do you mean the new documentary he posted?" That is the
5 reference he posted something.

6 Q. Thank you.

7 A. Yes, it seems to be. I really don't recall what the
8 posting was that day.

9 Q. All right. Then the next email up, "He had a whole think
10 about the JTF." Do you know what that is?

11 A. Yes, that stands for a task force I put together with the
12 Division of Student Affairs, it is the journalism task force
13 that the vice-president for student affairs and I were trying
14 to get faculty and I together to work with the student media so
15 we could come up with a stronger partnership.

16 This looks like Dr. Tracy mentioned that task force. As I
17 recall, he doesn't like the task force, he had a whole thing
18 about the JTF, and then took it down.

19 MR. LEO: Objection, move to strike comments about
20 what Professor Tracy wrote that she was not aware of.

21 THE COURT: Overruled.

22 BY MR. CURLEY:

23 Q. In the next email, "No, I didn't see it. I wish I had.
24 How entertaining to be the subject of one of his conspiracy
25 theories!" Had you been told you were accused of conspiring

1 with others to get him or something like that?

2 A. I believe that was hinted at or part of the content of his
3 post on that day.

4 Q. All right. How did you feel about that?

5 A. Um-m-m, he can write what he wants to write, I don't
6 particularly like it.

7 Q. That is his opinion, right?

8 A. Yes.

9 Q. And this is January 7th, when you said a nut job. What is
10 that about?

11 A. I thought it was nutty that he thought that the journalism
12 task force had anything to do with his termination.

13 I think he was conflating a lot of things in that article
14 and I thought it was nutty.

15 Q. Okay.

16 MR. CURLEY: One moment, your Honor, I think I am
17 going to move into direct examination, but I want to check my
18 notes.

19 THE COURT: Okay.

20 MR. CURLEY: A few more questions, your Honor.

21 THE COURT: Okay.

22 MR. CURLEY: Exhibit 22, please, Defendant's.

23 BY MR. CURLEY:

24 Q. I want to draw your attention, this is Professor Tracy's
25 email. Do you know who these folks are, Bob Zoeller and the

1 other people here?

2 A. Yes.

3 Q. Who are they?

4 A. Timothy Lenz is a professor in the Department of Political
5 Science, Susan Reilly is a professor in the School of
6 Multimedia Studies, Bob Zoeller is a professor in the College
7 of Education, not sure of what department. At that point, he
8 was, I believe, president of the union that year. Christopher
9 Robe is a professor in the School of Communication, Multimedia
10 Studies and I believe had a role as an officer in the union.

11 Q. All right. There is no management on this, these are all
12 union people, right?

13 A. Seems to be, yes.

14 Q. You certainly weren't copied on this?

15 A. No.

16 Q. Do you see where -- in the bottom paragraph where he writes
17 "since money would be passing hands this surely would make
18 filing such a form appropriate?

19 A. Yes.

20 Q. All right. You said earlier you thought Dr. Tracy
21 understood his responsibilities; is that right?

22 A. Yes.

23 Q. Let's look at Exhibit 23. You knew he was the president of
24 the union for several years, right?

25 A. Yes.

1 Q. Were you aware he signed a collective bargaining agreement?

2 A. Yes. He was the president during the signing of the
3 previous collective bargaining agreement from 2009 to 2012.

4 Q. Let's look at Exhibit 23.

5 This is the one where he talks about not checking the box.

6 MR. LEO: Objection, leading.

7 THE COURT: It is cross-examination.

8 MR. LEO: It is direct, your Honor.

9 THE COURT: No, counsel said he wasn't ready yet.

10 MR. LEO: I misheard him.

11 BY MR. CURLEY:

12 Q. Does it appear to you Professor Tracy understands his
13 obligations?

14 A. Yes, it does.

15 MR. LEO: Objection, calls for speculation, lack of
16 personal knowledge. Move to strike.

17 THE COURT: The question was directed to what it
18 appeared to this witness, so in that regard, I will let the
19 answer stand. I won't strike it over the objection, but the
20 witness can't speculate what Dr. Tracy actually understood and
21 thought, but her impressions are her impressions and she may
22 testify about them.

23 BY MR. CURLEY:

24 Q. It looks like doctor -- Professor Tracy is correcting Dr.
25 Williams, directing him on exactly what is required and his

1 understanding, right?

2 A. It looks like he is correcting Dr. Williams. He is telling
3 Dr. Williams that his own statements were misleading, he says
4 he is taken aback. It seems to me that he is attempting to
5 clarify the policy for Dr. Williams.

6 Q. All right. Your Notice of Discipline to Dr. Tracy was on
7 November 10, 2015, right?

8 A. Yes.

9 Q. 111, please. Go to the bottom paragraph about
10 insubordination cut and dry.

11 Again, he is talking to the union folks here?

12 A. It looks like this is addressed to Doug McGetchin and Mike
13 Budd, who were union officers, yes.

14 MR. LEO: Objection, this is speculation.

15 THE COURT: The witness shouldn't speculate. If you
16 know the answer, you can answer. If you don't know, you should
17 say you don't know.

18 THE WITNESS: I was looking at who the email was sent
19 to. Is that what you wanted me to answer?

20 BY MR. CURLEY:

21 Q. It is.

22 A. The email is sent to the president of UFF and a copy to
23 Doug McGetchin and Mike Budd. I know Doug McGetchin was a
24 union officer, I am not sure if Mike Budd was.

25 Q. He is telling them "in terms of the specific description of

1 insubordination and my actions, it's cut and dry."

2 Did he ever acknowledge that to you?

3 A. No.

4 Q. Okay. And that was the day after your note to him, right?

5 A. I am trying to find a date.

6 Q. I stand corrected, it looks like the 24th.

7 A. The 24th.

8 Q. A couple of weeks.

9 A. Right.

10 Q. My point is, he had your letter, right?

11 A. Yes.

12 Q. Exhibit 28, please -- I am sorry, Defendant's 29.

13 This is the ultimate letter to Dr. Tracy, proposed
14 discipline, right?

15 A. Correct.

16 Q. Who was the author of this letter?

17 A. Dr. Alperin.

18 Q. And it has a lot more information than your draft, doesn't
19 it?

20 A. Yes.

21 Q. What is the purpose, as you understand it, of a notice of a
22 proposed discipline?

23 A. It puts the employee on notice and allows them an
24 opportunity to file a grievance or respond in some way.

25 Q. Did Professor Tracy respond?

1 A. No.

2 Q. He didn't write you back?

3 A. No.

4 MR. LEO: Objection, cumulative.

5 THE COURT: Overruled.

6 BY MR. CURLEY:

7 Q. He didn't write you back?

8 A. No.

9 Q. No emails?

10 A. No.

11 Q. Phone calls?

12 A. No.

13 Q. Did that surprise you?

14 A. Yes, it did.

15 Q. What were you expecting?

16 A. Given all the push back we had been engaged in, I still
17 couldn't imagine that he was willing to risk being terminated.

18 It surprised me that he didn't just fill out the forms, and
19 if he didn't like something that happened as a result of that,
20 he could grieve, he had opportunities to grieve and continue to
21 work with us.

22 So, it surprised me that he didn't. It seemed to me like
23 he was egging this on.

24 Q. All right. Exhibit 29, please. Put up 78 first, if you
25 would, just to put it in sequence. All right. We looked at

1 this before.

2 Now, the next day is Exhibit 29, right? He had been given
3 an extension to respond to the Notice of Discipline, right?

4 A. Correct.

5 Q. But no response?

6 A. No response.

7 Q. And who authored this letter, 29?

8 A. Dr. Alperin.

9 Q. Can we see the signature page, please.

10 Did you have any knowledge that the university's attorney
11 mentioned him, Mr. Glick, and reached out to Professor Tracy's
12 attorney for information on the book and the disclaimer?

13 A. No.

14 Q. 216-A, page three.

15 This is the email about that this was not brought to your
16 attention. Is that something Vice Provost Alperin was dealing
17 with?

18 MR. LEO: Objection, lack of personal knowledge.

19 THE WITNESS: I don't recall this.

20 MR. CURLEY: Can we see the date on that before you
21 take it down.

22 MR. LEO: Same objection, your Honor.

23 THE COURT: I will allow the witness to look at the
24 date. If she doesn't recall, doesn't have knowledge, she
25 should say so.

1 THE WITNESS: I don't have knowledge of this.

2 BY MR. CURLEY:

3 Q. Okay. Thank you. Exhibit 25.

4 Do you see where it says "also within 24 hours of
5 receipt" -- highlight that.

6 You included this in the notice to Professor Tracy. Was
7 this to ensure he had clarity on what your expectations were?

8 A. That's right.

9 Q. Would you go down to "failure to meet."

10 You were asked about was Professor Tracy advised of the
11 potential for discipline, termination. You started to answer
12 and you were cut off. Does this address your concerns?

13 A. Yes, I state "clearly failure to meet any of the
14 requirements above may result in further disciplinary action."

15 Q. Next page.

16 Disciplinary action is a reprimand subject to Article 20 --
17 what is Article 20?

18 A. Article 20 is the grievance and arbitration procedure.

19 Q. So, you are telling Professor Tracy here if he doesn't
20 agree with what you are disciplining him on, he can file a
21 grievance?

22 A. Exactly.

23 Q. Take it to the union and see what happens, right?

24 A. That happened in the past, yes.

25 Q. That happened earlier, right?

1 A. Correct.

2 Q. That is how you came to the settlement agreement?

3 A. Correct.

4 Q. Did he grieve this?

5 A. No.

6 Q. Did he grieve anything?

7 A. No.

8 Q. There was a reference to an expedited grievance before. Do
9 you see 19.5 there?

10 What is that for?

11 A. I don't know.

12 Q. It says, "In the event a proposed outside activity is
13 determined to constitute a conflict of interest."

14 Might that be where the supervisor and employee don't
15 agree?

16 A. Don't agree.

17 MR. LEO: Objection, lack of personal knowledge.

18 THE COURT: You can ask if the witness has personal
19 knowledge.

20 BY MR. CURLEY:

21 Q. Is that what that is for, do you know?

22 A. It sounds like it is for when there is a disagreement
23 between the faculty member and supervisor, as you said.

24 Q. It talks about an expedited grievance. Do you know what
25 that means?

1 A. It would be outlined in 20.15, I guess.

2 Q. Maybe we ought to ask the guy that signed the collective
3 bargaining agreement.

4 MR. LEO: Objection, counsel is testifying.

5 THE COURT: Sustained.

6 BY MR. CURLEY:

7 Q. Who signed the agreement.

8 MR. LEO: Objection, asked and answered, cumulative.

9 THE COURT: Overruled.

10 THE WITNESS: The collective bargaining agreement for
11 2009 to 2012 was signed by Dr. James Tracy.

12 MR. CURLEY: Your Honor, I am going to switch over to
13 direct.

14 THE COURT: Okay.

15 MR. CURLEY: It will be abbreviated, your Honor.

16 THE COURT: Okay.

17 MR. CURLEY: May I proceed?

18 THE COURT: Yes.

19 BY MR. CURLEY:

20 Q. We are going to start from the beginning.

21 A. Okay.

22 Q. Would you introduce yourself to the jury and tell them who
23 you are and what you do?

24 THE COURT: I will remind the jury again, Dr. Coltman
25 is one of the witnesses who both sides wanted to call. She was

1 called initially by the Plaintiff and so the Defense had the
2 opportunity to cross-examine her, and now Defense is going on
3 direct examination as if the Defense is calling her.

4 All of this is an attempt to save time, that is why it
5 may seem some questions might appear -- may be out of order,
6 but it is now as if Defense counsel is beginning his direct
7 examination of a witness he would want to call, but the
8 Plaintiff called first.

9 MR. CURLEY: Thank you, your Honor.

10 BY MR. CURLEY:

11 Q. Tell them who you are and what you are doing now.

12 A. My name is Heather Coltman, I was at FAU for 24 years,
13 ended up as Dean for the College of Arts and Letters. This
14 summer, I transferred to James Madison University in Virginia
15 where I currently serve as Provost and senior vice-president.
16 Sorry.

17 Q. All right. Do you have kids?

18 A. Yes, I have three boys.

19 Q. All right. And why did you leave FAU?

20 A. Don't get me wrong, I love FAU, but the opportunity to
21 serve as Provost was something I couldn't turn down. It is an
22 expanded responsibility, expanded impact, a move to a different
23 part of the country, to a university that is excellent, so it
24 was a great opportunity for me.

25 Q. All right. How long did you serve as the Dean of Arts and

1 Letters at FAU?

2 A. A total of six years.

3 Q. What are the responsibilities of the dean?

4 MR. LEO: Objection, cumulative.

5 THE COURT: Overruled.

6 THE WITNESS: So, the dean is like the CEO of a
7 college, you are responsible for supervising all the faculty,
8 you are responsible for delivering the curriculum and making
9 sure students are enrolled, advised and can graduate in a
10 timely fashion, responsible for all of the facilities and
11 equipment associated with the academic programs, fund raising,
12 responsible for communications and public relations.

13 There is a lot more. You are responsible basically
14 for the success of the academic programs in the college.

15 BY MR. CURLEY:

16 Q. How did you first come into contact with Professor Tracy?

17 A. Um-m-m, I don't remember when I first met him, it was
18 probably at a faculty gathering perhaps in 2009, 2010, so I
19 don't remember exactly, but we were in faculty together, we may
20 have seen each other at gatherings.

21 Q. How did you find out about his blog?

22 A. I first found out about the blog when I received an email
23 from his supervisor copying me on a complaint from a community
24 member right after the Sandy Hook incident.

25 Q. You weren't aware of it before then?

1 A. No, I wasn't.

2 Q. You weren't reading it?

3 A. No.

4 Q. We looked at your notes before, we are not going to rehash
5 that.

6 Would you put up 2-A real quick so we know what we are
7 talking about.

8 Okay, these are the notes you talked about before. This is
9 what you did when you learned about the blog and what was going
10 on?

11 A. Well, we sort of went into crisis mode, there was a lot
12 going on on campus, we were inundated with upset people. Our
13 staff was trying to figure out how to handle this and it
14 required more than just my office, that is why I wanted to meet
15 with these other university officials.

16 Q. Okay. Earlier, I think you mentioned on cross-examination
17 that you didn't have a lot of experience dealing with issues
18 like this?

19 A. Correct, I had not dealt with anything like this.

20 Q. How long had you been the dean at this point in time?

21 A. So, I was still interim dean, whatever that difference
22 makes in the title, I had been interim dean for about a year
23 and a half, and I didn't have a lot of experience dealing with
24 this kind of reaction from the community and the level of what
25 I felt was kind of risky and dangerous, so I wanted to meet

1 with my superiors and upper administration and make sure we
2 were doing things in the best way possible.

3 Q. Are you saying that FAU doesn't have issues like this from
4 time to time?

5 A. I am sure we do.

6 Q. We heard earlier during the course of the trial about
7 Professor Deandre Poole. Are you familiar with him?

8 A. Yes, that was a little later, that was that same semester,
9 but that began in March.

10 Q. What was that about?

11 A. So, Dr. Poole, in the course of a classroom exercise,
12 assigned the students something out of his textbook that one of
13 the students found very objectionable. That student went to
14 the media and all of a sudden there was this massive media
15 attention, and similar to Dr. Tracy, we received a lot of
16 emails from very unhappy people in the public and in the media.

17 Q. That is what was known as Stomp on Jesus?

18 A. It became known as Stomp on Jesus, yes.

19 Q. Did Professor Poole keep his job?

20 A. Yes.

21 Q. There were other incidents. Do you remember GEO?

22 *THE COURT:* Restate the question.

23 *BY MR. CURLEY:*

24 Q. Are you familiar with any issues that came up over GEO?

25 A. Absolutely.

1 MR. LEO: Objection, leading.

2 THE COURT: Overruled.

3 THE WITNESS: I was familiar that semester that the
4 university accepted a donation known as the GEO Group to name
5 the stadium after their company. There were a lot of
6 protestors against that, led to negative media attention and
7 complaints from people in the public.

8 BY MR. CURLEY:

9 Q. In your view, is this something that the university --
10 these are the kinds of things that a university of your size
11 has to deal with from time to time?

12 A. Absolutely. You need to have an expectation that these
13 things will happen and hopefully you can handle them
14 accordingly.

15 Q. And we went through the notes.

16 When you left the meeting with Professor Tracy, I guess on
17 the 18th, what were your expectations of what changes might
18 occur?

19 A. Um-m-m, I understood that we had come to an agreement that
20 he needed to go ahead and post the appropriate disclaimers on
21 the memoryhole blog, and I hoped that we would continue to just
22 see him taking responsibility for the requirements of his job.

23 MR. CURLEY: May I approach, your Honor?

24 THE COURT: Yes.

25

1 BY MR. CURLEY:

2 Q. I handed you what is marked Defendant's 230?

3 A. Right.

4 Q. Do you recognize what that is?

5 A. Yes.

6 Q. What is it?

7 A. So, these are the notes I made for myself in advance of the
8 meeting with him and attached to it is a whole lot of work that
9 I had done investigating policies and how he may have been
10 complying or not complying with them.

11 Q. This is your homework?

12 A. This was my homework.

13 MR. CURLEY: We move Exhibit 230 into evidence, your
14 Honor.

15 MR. LEO: Objection, hearsay.

16 MR. CURLEY: If you want me to lay a records
17 foundation, I can, your Honor.

18 THE COURT: Defendant's 230?

19 MR. CURLEY: Yes, your Honor. Do you need a copy?

20 THE COURT: I have it. All right. Why don't you lay
21 a foundation with the witness before getting into the
22 particular content of it.

23 MR. CURLEY: Okay, your Honor.

24 BY MR. CURLEY:

25 Q. Do you recognize these notes as a document that you

1 compiled?

2 A. Yes.

3 Q. And you compiled these at or about the time --

4 MR. LEO: Objection, leading.

5 THE COURT: Sustained.

6 BY MR. CURLEY:

7 Q. When did you compile your notes?

8 A. In January, possibly early February, 2013.

9 Q. And were these notes something you kept in the ordinary
10 course of the business?

11 A. Yes.

12 Q. And these are records that the university maintains as part
13 of its business?

14 A. These are in a file I maintained, yes.

15 MR. CURLEY: At this time I move Exhibit 230 into
16 evidence.

17 MR. LEO: Objection, lack of foundation.

18 THE COURT: Well, if you want to make an inquiry of
19 the witness -- I assume you are moving it in under 803(6), the
20 business exception.

21 MR. CURLEY: Yes, your Honor.

22 THE COURT: Unless there are any questions the
23 Plaintiff wants to ask the witness as relates to that
24 exception, I believe that is what the Defendant has attempted
25 to do.

1 MR. LEO: Your Honor, we waive the objection.

2 THE COURT: Okay. So, no objection?

3 MR. LEO: No.

4 THE COURT: Defendant's 230 is admitted without
5 objection.

6 (Whereupon Defense Exhibit 230 was marked for evidence.)

7 BY MR. CURLEY:

8 Q. All right. I don't want to spend too much time on this, if
9 you could take us through -- put those up, we've seen -- page
10 one is the same as the last page of Exhibit 2-A, right?

11 A. Yes.

12 Q. What is the next page?

13 A. So, as I said, I was pretty new to this job and I hadn't
14 dealt with anything like this. I wanted to make sure I fully
15 understood what the requirements were. Basically, the first
16 page, I was looking at what could be a failure to distinguish
17 between Dr. Tracy's personal opinions and those of the
18 university, and I examined a whole set of documents that are
19 listed there.

20 Q. Are these the notes you made for yourself?

21 A. Yes.

22 Q. Okay. What is on the next page?

23 A. That is a continuation of that page.

24 So, I am looking at some of the articles that were
25 published on Global Research, things that occurred on the

1 memoryhole blog, and listing instances where he could be out of
2 compliance with the policy and regulations.

3 Q. Okay. What is on the next page?

4 A. I was looking at if there was a possible instance of
5 research misconduct, and this includes that email from Dr.
6 Tracy to his supervisor where he talks about the research he is
7 undertaking, and I was just looking at various descriptions of
8 what ethical research entails, what responsible research
9 practice is, so I was attempting to get a full picture of what
10 he was doing.

11 Q. The email you are referring to is the one to Noemi Marin?

12 A. Yes.

13 Q. What is the next page?

14 A. A continuation of that. These are documents -- sorry, this
15 is an excerpt of the Code of Professional Ethics from the
16 National Communication Association, which would have been the
17 professional organization in his discipline.

18 Q. Okay. And the next page?

19 A. Are we on this one --

20 Q. Conflict of interest/outside activity, disruption and
21 misconduct.

22 A. I was looking at policy documents and handbook documents,
23 there may be instances of lack of compliance for potential
24 conflicts.

25 Q. All right. At the bottom of that page "faculty and

1 students reported feeling unsafe and subjected to unreasonable
2 hazard."

3 How did that come to your attention?

4 A. I was hearing from quite a few folks on campus, we talked
5 about the external community contacting me, but faculty,
6 certainly students and staff were expressing a lot of concern
7 to me. They felt perhaps our physical facilities were not
8 safe, and perhaps there may be angry members of the public who
9 may seek to come on campus and retaliate against the
10 university. People were nervous, it was a very stressful time.

11 Q. Is FAU gated?

12 A. No.

13 Q. You can just drive on?

14 A. Yes.

15 Q. Next page?

16 A. Um-m-m, just my note that the whole university was looking
17 at continuing to investigate what was happening on campus.

18 Q. You have a parenthetical here on that?

19 A. Yes.

20 Q. Tell me about that.

21 A. I wanted to make a note for my own reference that James
22 Tracy himself was not disrupting the community, but the
23 articles and responders were disrupting.

24 Q. You were not blaming Professor Tracy for his actions, it
25 was the fallout?

1 A. Exactly.

2 Q. All right.

3 MR. CURLEY: Your Honor, I will keep going until you
4 tell me it is time to take a break.

5 THE COURT: Okay.

6 BY MR. CURLEY:

7 Q. Anything -- "we talked about the discipline and came to a
8 settlement agreement," that is Exhibit 19. Can you put that
9 up, please.

10 What was your role, if any, in connection with this?

11 A. I had no role in the settlement agreement. Once I had made
12 my determination on Dr. Tracy's grievance, it passed on to Dr.
13 Alperin.

14 Q. All right. So, after the settlement agreement, were you
15 checking to see if Professor Tracy had filed outside activities
16 forms?

17 A. No.

18 Q. Why not?

19 A. I assumed that he would, I assumed that he would do what
20 all faculty do at the beginning of the subsequent academic
21 year, he would get his assignment and fill out his activity --
22 outside activity forms. I was pretty busy, I didn't have time
23 to hand pick faculty and check on him.

24 Q. That is up to the faculty?

25 A. That is right. They have an affirmative responsibility to

1 meet their obligations.

2 Q. Any other interaction with Dr. Tracy in 2013?

3 A. Nothing that I can talk about.

4 Q. 2014?

5 A. Nothing.

6 Q. Is he still blogging?

7 A. Probably. I don't know, I was not checking.

8 Q. You are not reading his blog?

9 A. No.

10 Q. What about 2015, what is going on?

11 A. The academic year starts, we get to September, end of
12 September, and Dr. Williams informs me that Dr. Tracy is
13 objecting to signing his assignment and clicking that pop-up
14 box.

15 Q. The pop-up box, where did that come from?

16 A. That was -- that was instituted by the Provost office in
17 collaboration with IT, I believe, to make sure that faculty
18 were aware and would acknowledge their awareness of the
19 requirement to fill out these forms.

20 MR. CURLEY: May I approach, your Honor?

21 THE COURT: Yes.

22 MR. LEO: Objection, hearsay.

23 THE COURT: I don't know what exhibit.

24 MR. CURLEY: I will proffer it up.

25

1 *BY MR. CURLEY:*

2 *Q.* Do you recognize Defendant's Exhibit 84?

3 *A.* Um-m-m, I don't believe I would have seen this, no. I may
4 have seen this, but it is not very familiar to me.

5 *Q.* Okay.

6 Why don't you put it aside, then.

7 *A.* All right.

8 *THE COURT:* So, that will be marked for ID since it
9 was mentioned.

10 *MR. CURLEY:* Right.

11 *THE COURT:* Okay.

12 *BY MR. CURLEY:*

13 *Q.* The pop-up box, going back to that, were you advised that
14 there had been some sort of audit that required the institution
15 to have the pop-up?

16 *A.* Yes.

17 *MR. LEO:* Objection, leading.

18 *THE COURT:* Sustained.

19 *BY MR. CURLEY:*

20 *Q.* How is it that the box came into being?

21 *A.* It was --

22 *MR. LEO:* Objection, asked and answered.

23 *THE COURT:* Overruled.

24 *THE WITNESS:* It was a decision made by the Provost to
25 improve the FAIR system and how faculty received the

1 assignments, to the best of my knowledge.

2 *BY MR. CURLEY:*

3 Q. Did you have to check the box?

4 A. Yes, oh, yes.

5 Q. Does everybody check the box?

6 A. Yes.

7 *MR. LEO:* Objection, calls for speculation, lack of
8 personal knowledge.

9 *THE COURT:* Well, I don't think -- the question was,
10 was everyone supposed to or did everyone do it?

11 *MR. CURLEY:* One person didn't.

12 *MR. LEO:* Move to strike counsel's testimony.

13 *THE COURT:* Reask the question.

14 *BY MR. CURLEY:*

15 Q. Is everybody supposed to check the box?

16 A. Correct.

17 Q. When do you recall the box first coming into being and
18 being required?

19 A. I recall it for the 2014-15 academic year.

20 Q. When you check the box, what are you saying?

21 A. It is acknowledging that you are required -- or that you
22 know that you are required to submit outside activity forms as
23 outlined in FAU regulations and policies.

24 Q. How does this relate to the honor system that you talked
25 about before?

1 A. So, whether or not you have outside activities, you still
2 have to click the box. It confirms you understand there are
3 policies associated with outside activities forms. If a
4 faculty member is engaging in outside activities, they click
5 the box to note that they know they have to fill out the forms
6 and they fill out the forms.

7 MR. CURLEY: 142, please.

8 THE COURT: Which number is it?

9 MR. CURLEY: Defendant's 142, your Honor.

10 THE COURT: Okay, it is in.

11 MR. CURLEY: Thank you.

12 BY MR. CURLEY:

13 Q. Okay, we have 142 up. This is the outside activities form?

14 A. Yes.

15 Q. Would you highlight "I hereby certify." Thanks.

16 This is the -- this is the professor certification they are
17 supposed to give regarding their judgment on outside activity?

18 A. That is correct.

19 Q. How does it work when they fill it out? What happens next?

20 A. They fill it out and sign it and hand it in to their
21 supervisor, who, if there is no conflict, will sign it and send
22 it up to the dean.

23 Q. What if you disagree?

24 A. If there is a question, if the supervisor wants to know
25 more about it, they will talk to the faculty member and learn

1 more about it.

2 Q. Is there anywhere on the form where it asks for the content
3 of speech?

4 A. No.

5 Q. Is there anywhere on the form where it asks how much money
6 are you getting?

7 A. No.

8 Q. This is the form you wanted Professor Tracy to fill out?

9 A. Yes.

10 Q. So, how did it come to your attention?

11 You mentioned Dr. Williams.

12 A. Yes, Dr. Williams let me know that Dr. Tracy had not signed
13 his assignment, which meant that he hadn't clicked the pop-up
14 box, and he was objecting to fill out the outside activity
15 forms.

16 MR. CURLEY: Okay, is 86 in? No? May I approach,
17 your Honor?

18 THE COURT: Yes.

19 BY MR. CURLEY:

20 Q. I am handing you what is marked Defendant's 86. Do you
21 recognize this?

22 A. Yes.

23 Q. What is this?

24 A. An email from Diane Alperin to me providing clarification
25 regarding what needed to happen in terms of the assignments and

1 outside employment, outside activity forms.

2 THE COURT: What exhibit did you say it was?

3 MR. CURLEY: Defendant's 86, your Honor.

4 THE COURT: Okay.

5 MR. CURLEY: At this time I offer it into evidence.

6 THE COURT: Any objection?

7 MR. LEO: Hearsay, your Honor.

8 THE COURT: Response.

9 MR. CURLEY: I will lay a foundation.

10 THE COURT: Well, I mean -- I guess you can try. It
11 is from your party, so I don't think it is 801.

12 MR. CURLEY: I will say it is a business record.

13 THE COURT: You can proceed.

14 BY MR. CURLEY:

15 Q. This is an email, I don't want you to talk about the
16 content until it comes into evidence.

17 This is an email. Who is it from?

18 A. Diane Alperin.

19 Q. Is she someone who has personal knowledge of the content of
20 the email?

21 A. Yes.

22 Q. Are emails regularly kept in the ordinary course of
23 business of FAU?

24 A. Yes.

25 Q. Is this one such email kept by FAU in its business records?

1 A. Yes.

2 MR. CURLEY: At this time I offer Exhibit 230, your
3 Honor.

4 THE COURT: Any followup questions from the Plaintiff?

5 MR. CURLEY: It is 86, your Honor, I misspoke.

6 THE COURT: 86.

7 MR. LEO: May I inquire?

8 THE COURT: Yes.

9 BY MR. LEO:

10 Q. Dr. Coltman, how do you know this is a record that is kept
11 in the ordinary course of business at the university?

12 A. I know that all email exchanges are retained on the
13 servers.

14 Q. Is that the only reason that you are saying that this is a
15 regularly kept record?

16 A. I know I kept records. I had a folder marked Alperin and I
17 would keep in there all the emails from Diane Alperin, so I
18 kept it in a folder.

19 Q. So, is it your testimony all emails sent to your email are
20 records you kept in the ordinary course of business?

21 A. I wouldn't keep all of my emails. If it pertained to
22 something important to the functioning of the college, I would
23 retain it.

24 Q. With respect to this email, did you create this record?

25 A. I am not sure what you mean, did I create the record.

1 Q. Is this an email you wrote?

2 A. No. Diane Alperin wrote this.

3 Q. You didn't create this, Diane Alperin did?

4 A. Correct.

5 MR. LEO: I move to strike the testimony regarding the
6 foundation as well as there is no foundation.

7 THE COURT: She said she kept it in the course of her
8 regularly conducted activity, all email relating to these type
9 of topics from Diane Alperin.

10 MR. LEO: She didn't create --

11 THE COURT: You don't create it. That is the point of
12 803(6), it is not created, it is how it is maintained. If you
13 want to the look at 803(6) --

14 MR. LEO: The witness testified all of her emails are
15 created and kept.

16 THE COURT: Right, a record kept in the course of
17 regularly conducted activity and business.

18 MR. LEO: We would like to revisit some of the earlier
19 emails which were excluded under similar grounds.

20 THE COURT: I am not taking up reconsiderations now, I
21 am taking up this exhibit.

22 I am asking you, you can point out where does it fall
23 short. Maybe it does. Where does it fall short of 803(6)? I
24 have given you a chance to examine the witness on it, so now I
25 am asking for your view on it.

1 MR. LEO: I don't think she satisfied the elements of
2 803(6), it requires she is a custodian or certified witness to
3 certify this is an actual business record.

4 THE COURT: We will take our mid-afternoon break at
5 this point.

6 So, ladies and gentlemen, it is about five minutes to
7 3:00, we will be in recess until 3:15 or so. Remember the same
8 important instructions, not to discuss the case, not to have
9 any contact with anyone associated with the case.

10 I will remind our witness you remain under oath, and
11 you are not to discuss your testimony with anyone.

12 Okay, we will be in recess.

13 *(Thereupon, the jury leaves the courtroom.)*

14 THE COURT: Okay, you can feel free, Dr. Coltman, to
15 step down. If you want to the step out, we'll discuss the
16 email at issue here and we will take our break.

17 *(The witness exits the courtroom.)*

18 THE COURT: What is the objection?

19 MR. MEDGEBOW: Your Honor, subsection A, must testify
20 the record was made near or at the time. She said she printed
21 them off, she didn't say she printed them off -- she didn't say
22 anything.

23 THE COURT: I allowed counsel for your team to examine
24 the witness on precisely these points. Now we don't know.

25 MR. MEDGEBOW: They never elicited it either. If you

1 don't know, it hasn't been satisfied.

2 *THE COURT:* You objected, and I said would you like an
3 opportunity to examine. That is something you can ask so it
4 would be established, and you didn't raise that as a basis.
5 You are raising it now, that is fine.

6 When she comes back we will ask her outside the jury's
7 hearing, number one, whether she can testify whether the email
8 that Diane Alperin wrote was made at or near the time -- or at
9 or near the time by or from information transmitted from
10 someone with knowledge. So, I suppose you can ask whether
11 Diane Alperin has that knowledge if she knows. And then what?

12 Don't we know enough about Diane Alperin to know she
13 probably has knowledge about that? She was on the stand a long
14 time.

15 *MR. LEO:* This is with respect to a FAIR assignment
16 system, which the witness said was not related to --

17 *THE COURT:* I let everything in. I know you made that
18 argument, but I let them in.

19 I am talking about the exception here, how else does
20 it not meet the exception?

21 *MR. MEDGEBOW:* That is one of the main -- that is the
22 main issue right there.

23 *THE COURT:* Whether she has knowledge of it?

24 *MR. MEDGEBOW:* Whether or not it was made at or near
25 the time by -- or from the information transmitted by someone

1 with knowledge. And to the Court's next question, as an
2 example something you left out with the FAIR system was the
3 care of emails, and he wasn't fired because he didn't report
4 things.

5 The Defendant argued this is part of the FAIR system
6 and would be confusing, and the Defendants took other exhibits
7 that were clearly emails between FAU employees, although the
8 Court ruled they were not admissions under 801(d)(2)(D).
9 Several times there were business record exceptions, and we
10 never got to that and the witness' testimony --

11 *THE COURT:* Okay, you have not, to my recollection,
12 tried to establish a business exception having laid the
13 foundation that the Court has been in a position to rule.

14 If you attempt to lay the foundation and ask the Court
15 to rule, the Court will rule on it. I don't think you can just
16 throw that out.

17 The FAIR -- Karen Leader's email was ultimately
18 excluded because it was hearsay.

19 I don't believe any argument was made for a business
20 exception, and even if it was, there was no one questioned to
21 lay that foundation.

22 So, again, going back to -- not to revisit old
23 arguments, your argument as to this exhibit is 803(6), that has
24 not been laid yet, that foundation.

25 *MR. MEDGEBOW:* Yes.

1 *THE COURT:* Anything else?

2 *MR. LEO:* With respect to this exhibit -- not with
3 respect to this exhibit.

4 *THE COURT:* When the witness comes back we will have
5 that proffer outside the jury's hearing to see whether she
6 knows whether Dr. Alperin made the record at or near the time
7 or from information transmitted by someone with knowledge.

8 Let me have your break right now.

9 How much longer with Dr. Coltman?

10 *MR. CURLEY:* Five to ten minutes.

11 *THE COURT:* From the Plaintiff?

12 *MR. LEO:* I don't expect to be that long.

13 *THE COURT:* Who is next then? A revised trial plan is
14 still in the works.

15 *MR. LEO:* It has been modified again, your Honor. The
16 next witness will be Doug McGetchin.

17 *THE COURT:* Is he waiting for us?

18 *MR. LEO:* Followed by Doug Broadfield.

19 *THE COURT:* So we know, the next person, then, is Doug
20 McGetchin, and after that, Doug Broadfield.

21 *MR. LEO:* Yes.

22 *THE COURT:* Are they both short?

23 *MR. LEO:* Yes.

24 *THE COURT:* So we could get through them today.

25 *MR. LEO:* And Mr. Robe after that, and that should be

1 it for the Plaintiff.

2 *THE COURT:* What time should I ask the jury to stay
3 today? What time do we think?

4 *MR. LEO:* I would like to try to finish today if it is
5 possible and we will try to keep the next three witnesses very
6 short to make it happen.

7 *THE COURT:* Do you think by 5:30?

8 *MR. LEO:* That is what we will be shooting for.

9 *THE COURT:* Why doesn't Defense look at 86, if you are
10 going to pursue it.

11 *MR. FEICHT:* We were told to bring witnesses Glanzer,
12 Metcalf, Hull and Morton. May we release them?

13 *MR. MEDGEBOW:* Can we let them know after the break?

14 *THE COURT:* Yes, talk about it after the break.

15 *(Thereupon, a short recess was taken.)*

16 *THE COURT:* All right. Let's see. With respect to
17 Defense Exhibit 86, we can pull -- we can bring Dr. Coltman
18 back in, and if you want to continue asking her questions, one
19 of the things she is going to have to testify to -- in order
20 for the contents of an email to be a business record, the
21 proponent must establish five things; the email must have been
22 sent or received at or near the time of the events recorded in
23 the email, 803(6)(a). One must look at each email.

24 Second, the email must have been sent by someone with
25 knowledge of the events documented in the email, that is

1 803(6)(a). This requires a particularized inquiry,
2 particularized knowledge of the email.

3 Third, the email must have been sent or received in
4 the regular course of business activity, 803(6)(b),
5 case-by-case analysis.

6 Fourth, it is the Defendant's regular practice to send
7 or receive emails that record this type of activity or event
8 documented in the email. The employer must have imposed a
9 business duty to make and maintain such a record.

10 I mean, it seems to me there may be a lot there that I
11 am not sure Coltman is going to be able to testify to.

12 *MR. CURLEY:* I don't see any issue at all, your Honor.

13 *THE COURT:* You will need to go through that.

14 *MR. CURLEY:* Remember, at FAU they have to keep these
15 things.

16 *THE COURT:* Yes, that is fine. Every time I go in and
17 out of systems I get knocked out. Hold on, I need to get in
18 and out again.

19 What about the revised trial plan?

20 *MR. LEO:* We did not print it. We ran out of paper
21 over here. I will have somebody print it out, just one moment.

22 *MR. FEICHT:* Your Honor, may we release the witnesses
23 Glanzer --

24 *THE COURT:* Glanzer is being removed. Metcalf is not
25 being called?

1 MR. LEO: Yes.

2 THE COURT: Morton is not being called?

3 MR. LEO: Yes, your Honor.

4 THE COURT: They may be released.

5 Anybody else or just those? Yes, they may be
6 released.

7 MR. MEDGEBOW: Your Honor, regarding this --

8 THE COURT: Hold on one second. Okay, what was that?

9 MR. MEDGEBOW: In regards to the standard that the
10 Court just recited, is there case law from that or is that a
11 case you are referencing?

12 THE COURT: Yes, there are several cases, one of them
13 is -- I mean, a couple of different cases, Canitex (phon)
14 versus Silver Hawk, 2008 WestLaw 1999234, 12 Southern District
15 of Texas, May 2008, that is for the proposition business
16 records apply to --

17 MR. MEDGEBOW: Your Honor, the witness is in here.

18 THE COURT: You asked me for the case law, I don't
19 think that is going to be prejudicial.

20 I don't think any of us like to be interrupted,
21 actually.

22 MR. MEDGEBOW: I am sorry.

23 THE COURT: I am giving you the case law for the
24 proposition of the business records, imposed a business duty to
25 maintain such a record, required proof that the person prepared

1 the document. All the other citations were from the rule
2 itself. So, we can allow the continuation of the proffer.

3 I will also cite to you Marine Power Holding LLC
4 versus Malibu Boats LLC, 2016 WestLaw 4218217, United States
5 District Court, Eastern District of Louisiana.

6 So, Defense may continue with the proffer and then I
7 will let the Plaintiff -- it is 3:21, I would say, you know,
8 try to keep the time in proportion to this matter. Proceed.

9 *BY MR. CURLEY:*

10 Q. We are going to talk about 86, this email sent at or about
11 the time of October 29, 2015.

12 A. Yes.

13 Q. And was that in connection with your inquiry of the Vice
14 Provost?

15 A. Would you repeat that? I didn't hear you.

16 Q. Had you made an inquiry of the Vice Provost?

17 A. Yes.

18 Q. So, why did you ask her, is she the one who knows the
19 most --

20 *MR. LEO:* Objection, leading.

21 *THE COURT:* You may rephrase.

22 *BY MR. CURLEY:*

23 Q. Why was the question directed to the Vice Provost?

24 A. She knew more about the particular details of these
25 policies than I did. I just wanted to verify what her response

1 would be.

2 Q. In your view, is she one of the most knowledgeable --

3 MR. LEO: Objection, leading.

4 THE COURT: Rephrase.

5 BY MR. CURLEY:

6 Q. In comparison to others at FAU, how would you rate her as
7 having knowledge of these areas?

8 A. As Vice Provost, that is the person specializing in
9 personnel and union issues, she had the most knowledge of
10 anybody on campus.

11 Q. And with respect to the subject of the email, is that
12 something regularly undertaken at FAU?

13 A. Yes.

14 Q. And in terms of communicating with the Vice Provost about
15 issues like this, do you regularly send her emails back and
16 forth?

17 A. Yes.

18 Q. Like this one?

19 A. Yes.

20 Q. And you said that you kept this email?

21 A. I believe I did. I had a folder in which I would keep
22 emails from her.

23 Q. And are emails something that the university maintains in
24 its records as part of its obligations under the Sunshine Laws?

25 A. Yes, I understand that to be the case.

1 MR. CURLEY: I would offer the exhibit, your Honor.

2 THE COURT: Okay, is there anything -- any further
3 questions from the Plaintiff?

4 MR. LEO: Yes, your Honor.

5 BY MR. LEO:

6 Q. You said you believe that you kept this in a folder, but do
7 you know?

8 A. I don't know for sure right now.

9 Q. And with respect to the email here, it is referring to a
10 change that was made in 2014; isn't that right?

11 A. Yes.

12 Q. And this email is October 29, 2015; is that right?

13 A. Yes.

14 Q. And the statement in here, this was in response, as I
15 recall, to an audit as to grant applications. Do you have any
16 particular acknowledge with regard to that actual audit and
17 when it was taken?

18 A. I recall there being an audit by the Inspector General, and
19 I know that there were some issues as a result of it.

20 I can't speak with much more specificity than that.

21 MR. LEO: Thank you, that is all, your Honor.

22 THE COURT: Okay. So, what remaining objection is
23 there, if any?

24 MR. BENZION: The objection is that the email was not
25 created at or near the time of the matter set forth in the

1 email, this was added to FAIR in 2014, is a statement about
2 something done 2014, and an email sent in October 2015.

3 *THE COURT:* Okay. All right. I am going to sustain
4 the objection. You can have 86 marked for ID.

5 We may bring our jury in.

6 (Thereupon, the jury returned to the courtroom).

7 *THE COURT:* Welcome back, everyone.

8 Any concerns about staying until 5:30 tonight, do we
9 have any conflicts? Seeing no hands.

10 Okay. Did we do okay on the test yesterday?

11 All right. Proceed, please.

12 *BY MR. CURLEY:*

13 Q. I have handed you Defendant's 153?

14 A. Yes.

15 Q. What is that?

16 A. This is the report of professional activity that I filled
17 out, it looks like in 2013.

18 Q. This is your report?

19 A. Yes, this is a report for my outside activities.

20 *MR. CURLEY:* Your Honor, at this time I offer
21 Defendant's Exhibit 153 into evidence.

22 *MR. LEO:* No objection.

23 *THE COURT:* Okay, 153 is admitted without objection.

24 (Whereupon Defense Exhibit 153 was marked for evidence.)
25

1 BY MR. CURLEY:

2 Q. Would you explain what you have done here and why you did
3 it?

4 A. I was a faculty member in the Department of Music, I was a
5 concert pianist, and while I would perform and engage in
6 activities at FAU as part of my assignment, I also engaged in
7 activities outside. I was a concert pianist and lecturer and
8 private piano teacher, I did those activities throughout the
9 United States and abroad.

10 Q. Where does it tell us on the form how much money you made?

11 A. It doesn't.

12 Q. And why did you feel the need to fill out the forms?

13 A. It is required of faculty to fill out forms when they
14 engage in outside activity, so I wanted to make sure I let my
15 supervisor know I had these activities.

16 Q. Did your supervisor disagree -- you signed it --

17 Would you scroll down, please.

18 You signed here indicating what?

19 A. I am certifying that I don't believe these activities are a
20 conflict of interest.

21 Q. Why did you disclose it, then?

22 A. Because they were outside activities I needed to disclose,
23 in my opinion.

24 Q. Even though you didn't think it was a conflict?

25 A. Correct.

1 Q. That is the procedure?

2 A. When in doubt, fill it out. Yes, I would rather be clear
3 and fill out all of my activities.

4 Q. That is what you were asking Professor Tracy to do?

5 A. That is correct.

6 Q. Can you take us through the signature blocks and tell us
7 who signs off on this?

8 A. Sure. I signed it as myself, the employee, and I also
9 signed as the dean and then it was sent to the Provost, Gary
10 Perry, and he signed that on whatever date. I can't read his
11 handwriting.

12 Q. Okay. And then on the next page, that is Vice Provost
13 Alperin at the bottom there?

14 A. Correct, yes.

15 Q. And the last page?

16 A. Again, Gary Perry signed that one on the last page.

17 Q. All right. Why did -- I know you said Diane Alperin is the
18 one who made the ultimate decision, right?

19 A. Correct.

20 Q. Did you agree with her decision?

21 A. Yes, I did.

22 Q. Why?

23 A. Um-m-m, I felt that Dr. Tracy had been willfully ignoring
24 his directives. He was resisting and refusing to comply. When
25 he finally did comply, when he submitted forms, they weren't

1 complete, they were late, they missed the extended deadline I
2 had given him, and we hold our faculty to high ethical
3 standards.

4 When there is a doubt, you fill out the form. If there may
5 be a conflict, faculty should err on the full disclosure, not
6 hiding things. I felt he had not been honest, he had been
7 disingenuous, and certainly insubordinate. I agreed with the
8 decision, I couldn't continue to have him employed if he was
9 this resistant to following the policies of the university.

10 Q. Did you think it would come to this?

11 A. I never thought it would come to this. I thought he would
12 grieve.

13 MR. CURLEY: Nothing further, thank you, your Honor.

14 THE COURT: All right. From the Plaintiff.

15 MR. LEO: Yes, your Honor.

16 THE COURT: Is this redirect or cross or both? You
17 may proceed.

18 **REDIRECT EXAMINATION**

19 BY MR. LEO:

20 Q. Why don't we start where opposing counsel left off, the
21 outside employment forms. A moment ago you testified that you
22 turned in these outside activity forms, Defense 153?

23 A. Yes.

24 Q. Is it your testimony you turned them in without being told
25 to?

1 A. I think I was late on one year, I think I needed a reminder
2 one of the years, I don't know which year.

3 Q. Isn't it true that there was this audit in 2013, and as a
4 result of the audit, it was determined that you had not
5 submitted your forms?

6 A. That is probably what I am talking about, yes.

7 Q. What about the mantra when in doubt, fill them out?

8 A. Right, I think I just neglected to do it that year.

9 Q. You violated the honor system, right?

10 A. One could argue that, yes.

11 Q. But no discipline?

12 A. Um-m-m, no, I was asked to fill them out when it was
13 realized that I hadn't completed the form and so I filled it
14 out.

15 Q. Your superiors came to you and they said exactly what they
16 wanted on those forms, right?

17 A. No, they didn't tell me what to write on the forms, they
18 told me to fill out the form.

19 Q. Okay. Let's talk about the disclaimer issue.

20 Defense Exhibit 230, please, page three.

21 There was a lot of testimony about the disclaimer on
22 Professor Tracy's blog. There was no disclaimer, right?

23 A. Yes, there was a disclaimer on one of the links.

24 Q. That is here, "All items published herein represent the
25 views of James Tracy and are not representative of or condoned

1 by Florida Atlantic University or the State University System
2 of Florida." Do you see that?

3 A. Yes, I do.

4 Q. Is that your testimony, that it is not good enough to
5 comply with 5.3(d)?

6 A. In my opinion, it was not thorough enough.

7 Q. Not thorough enough.

8 Let's pull up Exhibit 55. Stop right here.

9 That is Article 5.3(e), right?

10 A. Correct.

11 Q. There is nothing here that says a faculty member cannot
12 reference FAU when they are speaking outside the school, does
13 it?

14 A. No. There is nothing there that says that.

15 Q. Nothing here that says when you are mentioning FAU talking
16 outside the school that you need to have a disclaimer, right?

17 A. Correct.

18 Q. And it doesn't say you cannot call yourself a professor
19 outside of the school, right?

20 A. Right.

21 Q. Earlier, you were talking about Professor Morton.

22 MR. LEO: Do you have 38-G? How about 9? I
23 apologize, I want to try to find the exhibit I want to ask you
24 about. Let's start with this one.

25

1 BY MR. LEO:

2 Q. I show you Plaintiff's 9 for identification purposes only.

3 You agree with me this is a publication by Professor Morton
4 in 2013, right?

5 A. Um-m-m, yes, it looks like -- I think it was the letter to
6 the editor we were talking about earlier.

7 Q. You remember that from 2013?

8 MR. CURLEY: Hearsay, consistent with your prior
9 ruling.

10 THE COURT: Right, it is marked only, not in evidence,
11 no testimony about the content of it.

12 BY MR. LEO:

13 Q. With respect to the article itself, you were aware of the
14 article?

15 A. Yes, I know -- it was a letter, I believe, to the editor.

16 Q. Professor Morton and two other professors published that
17 article, right?

18 A. Yes.

19 Q. And in the article they are referred to as faculty members
20 of the university, right?

21 MR. CURLEY: Hearsay, your Honor.

22 THE COURT: Sustained. The content of the article,
23 anything of the content of the document is not in evidence.

24 BY MR. LEO:

25 Q. Are you aware whether or not the professors disclaimed in

1 this publication that they were not speaking on behalf of the
2 university?

3 A. From what I see here --

4 MR. CURLEY: Your Honor, could I have a continuing
5 objection on hearsay?

6 THE COURT: Yes. The document is not in evidence, so
7 if the witness -- if you don't know the answer, you should say
8 you don't know, but you should not refer to the document to
9 answer the document -- to answer the question because that
10 would be revealing contents not in evidence. If you can,
11 answer it without reviewing the document for purposes of your
12 personal knowledge.

13 MR. LEO: I can ask it another way, your Honor.

14 THE COURT: Okay.

15 BY MR. LEO:

16 Q. At the time of the publication, you were aware of it,
17 right?

18 A. Yes.

19 Q. You were aware the professors who wrote this article did
20 not disclaim that they were not speaking on behalf of the
21 university; you agree?

22 A. Yes, to the best of my recollection.

23 Q. You were aware the professors were identified as professors
24 at the university?

25 A. I don't recall that from my own memory, I need to refer to

1 the document.

2 Q. Please, take a look, refresh your recollection.

3 A. I'm not sure what I am permitted to say.

4 THE COURT: Just do not testify about the contents of
5 the article.

6 BY MR. LEO:

7 Q. Without telling us what is in the article, I would like you
8 to tell us whether you were aware in 2013 that these
9 professors --

10 MR. CURLEY: Your Honor, we should probably approach.

11 THE COURT: Is it still going to the hearsay?

12 MR. CURLEY: It is going to several things, your
13 Honor.

14 THE COURT: Okay. Well, the document is not in
15 evidence, just ask questions as if the document is not in
16 evidence because it is not in evidence.

17 Don't ask a question that suggests something in the
18 document. Don't put a question to the witness that the witness
19 has to look at the document, pretend the document is off to the
20 side.

21 BY MR. LEO:

22 Q. You read this article in 2013, right?

23 A. I don't know that I read the article, I was aware it had
24 been sent.

25 Q. And you don't remember reading it?

1 A. I read it because I knew the statement had been written, I
2 don't remember reading it in the newspaper. Does that make
3 sense?

4 Q. No. You were aware that these professors had published a
5 statement?

6 A. Yes.

7 Q. In 2013?

8 A. Yes.

9 Q. And at the time, you did not discipline them for that
10 statement, correct?

11 A. Correct.

12 Q. And there was no investigation conducted at that time with
13 respect to the publication that these professors made?

14 A. Correct.

15 MR. LEO: At this time we move Plaintiff's 9 into
16 evidence.

17 MR. CURLEY: Same objection, your Honor, hearsay.

18 MR. LEO: It is not offered for the truth, it is
19 offered for the effect on the listener.

20 THE COURT: Overruled. You were able to accomplish
21 that through your questioning.

22 MR. CURLEY: It is a multi-page document.

23 THE COURT: Let's not have speaking objections. The
24 Court made the ruling, nothing about the testimony has changed,
25 and Plaintiff's counsel is not precluded from asking questions

1 about effect on the witness. You can ask the questions you've
2 asked. The document is hearsay, it is not coming in for any
3 other purpose -- any limited purpose, it is a comprehensive
4 document.

5 MR. LEO: To be clear, was the objection overruled as
6 to the effect on the listener?

7 THE COURT: Yes.

8 MR. LEO: It is in evidence?

9 THE COURT: No, it is sustained. The same ruling the
10 Court has made remains in effect.

11 MR. LEO: I am sorry, I thought I heard overruled.

12 THE COURT: Yes, I may have misspoken, I apologize.

13 MR. LEO: We will move on.

14 BY MR. LEO:

15 Q. There was talk, I believe, of safety concerns. You can put
16 that down.

17 In 2013, I believe you testified there were safety concerns
18 regarding Professor Tracy's activities outside the university?

19 A. Yes.

20 Q. Isn't it true there was another incident involving a
21 faculty member in 2013?

22 A. Yes.

23 Q. And it brought a lot of attention to the university, right?

24 A. Yes.

25 Q. Death threats?

1 A. Sorry, that was a question?

2 Q. Yes.

3 A. Yes.

4 Q. This was the Poole incident?

5 A. Yes.

6 Q. That was the same semester as the 2013 meetings you had
7 about Professor Tracy?

8 A. Yes.

9 Q. There was a letter from the Governor sent about Deandre
10 Poole?

11 A. I don't know about the Governor, something from Florida,
12 the Government.

13 Q. A big deal?

14 A. Yes.

15 Q. Protests?

16 A. On campus?

17 Q. Sure.

18 A. I don't remember if there were protests, but it was a big
19 deal.

20 Q. And that is why there was police presence that semester?

21 A. That certainly contributed to everyone's feeling of
22 insecurity.

23 Q. Regarding the book -- I will jump around -- in 2015, you
24 weren't aware of the book in 2015, written by Professor Tracy,
25 were you?

1 A. No, I wasn't.

2 Q. In 2016, you weren't aware of a book written by Professor
3 Tracy?

4 A. I became aware of a book at the end of 2015 and beginning
5 of 2016.

6 Q. A book?

7 A. I believe it is a book called Nobody Died at Sandy Hook.

8 Q. Is it your testimony that Professor Tracy wrote that book?

9 A. I have not read it, I believe he contributed a chapter to
10 the book.

11 Q. Which were blog posts which were copied by the actual
12 author of the book into the book?

13 A. I have no idea about that.

14 Q. Because you didn't read it?

15 A. Correct.

16 Q. And in 2015, that wasn't the reason why you were
17 disciplining Professor Tracy, was it?

18 A. The book was not, that is what you are saying?

19 Q. Right. That wasn't one of the reasons set forth in your
20 discipline letters that you sent to Professor Tracy, right?

21 A. Correct, I didn't know about the book at the time I wrote
22 the Notice of Discipline.

23 MR. LEO: 37-B, please.

24 THE COURT: 37-B as in boy?

25 MR. LEO: Yes.

1 *THE COURT:* Yes, that is in evidence already.

2 *BY MR. LEO:*

3 *Q.* Isn't it true that not all books are reportable -- not all
4 books are reportable activities?

5 *THE COURT:* I am going to interrupt. I am going to
6 make sure and -- make sure all people keep a watch in the
7 courtroom and make sure with the rule. I don't know if there
8 are any witnesses.

9 *MR. CURLEY:* We are trying, your Honor.

10 *THE COURT:* If you have a question, confer with the
11 other side.

12 *BY MR. LEO:*

13 *Q.* It says here this is December 14, right?

14 *A.* Right.

15 *Q.* This is before Professor Tracy's issue, notice of intent to
16 terminate, right?

17 *A.* Correct.

18 *Q.* And your testimony a moment ago is that you received a
19 complaint about a book he was selling about Sandy Hook, right?

20 *A.* That is right.

21 *Q.* This was not included in the notice to terminate, right,
22 the book?

23 *A.* Correct. I didn't know about it when I wrote the Notice of
24 Discipline.

25 *Q.* Right, but you knew about it on December 14, 2015, right?

1 A. Yes.

2 Q. And you didn't contact Professor Tracy at that time and
3 say, Professor Tracy, report a book that you wrote, did you?

4 A. No. I was waiting to get his outside activity forms that
5 were actually due that day.

6 Q. Right. On December 14, you knew he may have written a book
7 using his title to sell a book, but you didn't tell him to
8 report it on the form, did you?

9 A. No.

10 Q. Because you didn't want him to, right?

11 A. No.

12 Q. Let's talk about -- do you have Plaintiff's 26, please.

13 I will ask you, all books aren't reportable, isn't that
14 right? If I could direct your attention to this right here.

15 You agree with me, not all books are reportable?

16 A. I agree. I agree with you not all books are reported as
17 part of outside activity.

18 Q. Okay. Let's talk about Ms. Copeland.

19 206, please, Defendant's 206.

20 December 4th, Ms. Copeland resigns, right?

21 A. She submitted a letter as a notice of resignation on
22 December 4th, correct?

23 Q. But you didn't accept her resignation, did you?

24 A. Correct.

25 Q. Ms. Copeland worked in Boca Raton, Florida, didn't she?

1 A. She had a job at FAU in Boca, yes.

2 Q. And she lived in Boca Raton, right?

3 A. To the best of my understanding, she had an address in
4 Boca.

5 Q. Let's go to your letter terminating her after she resigned.
6 Why did you send it to Tallahassee?

7 A. If I recall correctly, that letter sent to Boca either was
8 undeliverable or we weren't confident that is where she lived,
9 and in the meantime, somebody determined she had a Tallahassee
10 address, I don't know who it was.

11 Q. Let me show you Plaintiff's 206 marked for ID only.

12 That is the tracking record from the United States Postal
13 Service for the letter you sent right here. Let's go down.

14 Would you agree?

15 A. Um-m-m --

16 Q. Do you see the screen?

17 A. Here is a number.

18 *THE COURT:* 206 is marked only.

19 *MR. LEO:* Marked only, yes, your Honor. I wanted to
20 confirm she has the tracking information.

21 *THE WITNESS:* Yes, this looks like the same tracking
22 number as indicated on this image on the screen.

23 *BY MR. LEO:*

24 Q. You agree Ms. Copeland never got the letter in the mail
25 terminating her?

1 A. It says undeliverable as addressed.

2 Q. Scroll down some more.

3 So, it comes back to the university undeliverable, it would
4 be returned?

5 A. It looks like it, yes, I assume it was returned.

6 Q. You send her another letter to the same address on
7 January 4th, right?

8 A. Correct.

9 Q. Why? She doesn't live there.

10 A. So, to the best of my memory, she had multiple addresses,
11 and we were attempting to find where the best mailing address
12 was.

13 I simply don't know the details who was looking up her
14 addresses and at what point we had confirmation where she was
15 living at any particular time.

16 Q. As you sit here today, do you even know if she got your
17 termination letter?

18 A. Um-m-m, no, I don't.

19 Q. It says up here -- it says here an email, but I didn't see
20 an email here. Do you have an email that this was emailed to
21 Ms. Copeland?

22 A. I am almost confident it was. If we said it was sent by
23 email, it was.

24 Q. That is the honor system, right?

25 A. For what?

1 Q. Let me draw your attention to one more thing on this
2 letter. Here we go.

3 In this letter you wrote "you accepted all terms and
4 conditions related to the report of outside employment
5 activity," right?

6 A. That is what it says, yes.

7 Q. That is referring to the check box, isn't it?

8 A. Yes, it is.

9 Q. She checked the box?

10 A. It looks like that is what it says, yes.

11 Q. Isn't it true the check box was put into effect for this
12 very reason?

13 A. For which very reason?

14 Q. So that when a faculty member makes a mistake, you can
15 terminate him, they understood and accepted all the terms and
16 conditions, right?

17 A. I can't speak to the reasons for the check box, that was
18 put in by the Provost's office.

19 Q. Put up 2-A, please. There we go could you make this
20 bigger.

21 A moment ago you were testifying about your notes and maybe
22 you can help me translate more of what this means.

23 I have a question: Did any of this refresh your
24 recollection what this meant, "First Amendment, find winning
25 metaphors"?

1 A. It doesn't. I testified earlier, I don't know what that
2 meant.

3 Q. As you sit here today, you can't tell us what this means?

4 A. Nope. It is a collection of words that I wrote down, I
5 don't remember what that referred to. Many, many things were
6 said.

7 Q. Was the check box a winning metaphor for the First
8 Amendment?

9 A. No. I don't know what you are asking, but no.

10 MR. LEO: No further questions, your Honor.

11 THE COURT: Okay. Defense doesn't have any more
12 questions?

13 MR. CURLEY: That is correct, your Honor.

14 THE COURT: Okay, thank you so much, you may step
15 down.

16 The Plaintiff may call your next witness. Who is your
17 next witness?

18 MR. LEO: Plaintiff calls Doug McGetchin.

19 THE COURT: Okay, he may come forward.

20 DOUG McGETCHIN, PLAINTIFF'S WITNESS, SWORN

21 THE WITNESS: Doug McGetchin, Professor at Florida
22 Atlantic University.

23 **DIRECT EXAMINATION**

24 BY MR. BENZION:

25 Q. Good afternoon, Mr. McGetchin.

1 A. Hello.

2 Q. In 2015, were you working at Florida Atlantic University?

3 A. Yes.

4 Q. The entire year, including December 2015?

5 A. Yes.

6 Q. And you were subject to the rules and regulations
7 promulgated by the university; is that right?

8 A. That is right.

9 Q. You were required to comply with the collective bargaining
10 agreement?

11 A. Yes.

12 Q. And article -- specifically, you were required to comply
13 with Article 5 of the collective bargaining agreement?

14 A. Yes.

15 Q. Were you a faculty member in Dr. Tracy's college in 2015?

16 A. Yes.

17 Q. The same college as Dr. Tracy was in?

18 A. Yes.

19 Q. You are familiar with Article 5, right?

20 A. Yes.

21 Q. 5.3(d), please. Specifically, you are familiar with this
22 provision, right?

23 MR. FEICHT: Objection, leading.

24 THE COURT: Sustained.

25

1 BY MR. BENZION:

2 Q. Are you familiar with 5.3(d)?

3 A. Yes.

4 Q. Okay. I saw you had to read to make sure that was
5 something you were familiar with.

6 A. Yes.

7 Q. And to be clear, Mr. McGetchin, you have to answer the
8 questions out loud so the Court Reporter can record your
9 answer, okay?

10 A. Yes.

11 Q. Thank you, sir.

12 5.3(d): Recognizing that faculty, as members of the
13 community, have rights and duties when speaking on any matters
14 of public interest, a faculty member shall make clear when
15 comments represent personal opinions, and when they represent
16 official university positions."

17 When you were working at FAU -- or in 2015, you understood
18 what that meant, right?

19 A. I don't quite know how to answer that.

20 I know there is a collective bargaining agreement and then
21 I looked up the portions of it, so, there is always more layers
22 to it, but generally I understand there is the -- what is it --
23 academic freedom privilege, so I would say yes.

24 Q. You are still employed at FAU today, correct?

25 A. That is correct.

1 Q. Are you still to comply with Article 5.3(d)?

2 A. Yes.

3 Q. Is this the article that requires you to have a disclaimer
4 on public speech outside the university?

5 A. I guess I would want to look at the whole Article 5. Can I
6 look at the whole Article 5?

7 Q. Yes, sure.

8 MR. BENZION: Please make it so Mr. McGetchin can look
9 at the whole Article 5.

10 MR. LEO: We will get the hard copy.

11 MR. BENZION: That is a good idea, thanks, gentlemen.

12 THE WITNESS: That looks like the article. You are
13 asking about the disclaimer portion, whether they need to put a
14 disclaimer?

15 BY MR. BENZION:

16 Q. Not they, is any faculty member subject to this article
17 here?

18 A. Right. For personal opinions versus university positions,
19 so, yes.

20 Q. So, you are saying it is your understanding this is the
21 article that required you to put a disclaimer on public speech?

22 A. Yes.

23 Q. Okay. As you sit here today, do you ever speak on matters
24 of public interest outside the university?

25 A. Sure.

1 Q. You have a Twitter account, right?

2 A. That is right.

3 Q. Do you tweet about current events?

4 A. Yes.

5 Q. Politics?

6 A. Sometimes, yes.

7 Q. Do you tweet about mass shootings and gun control?

8 A. Probably.

9 Q. Do you call yourself a professor on your Twitter account?

10 A. I think so.

11 Q. If I were to show you something, might that refresh your
12 recollection?

13 A. Sure. I take your word for it.

14 MR. BENZION: This isn't marked, I will have to mark
15 it at this time. If there is a number the Court is comfortable
16 with me using, I will use that number.

17 THE COURT: Well, I skip from 112 to 206, so call it
18 207.

19 MR. BENZION: I am good with that.

20 THE COURT: 207, you are just having it marked?

21 MR. BENZION: That is correct.

22 THE COURT: Generally, what is the description?

23 MR. BENZION: A screen shot of Mr. McGetchin's Twitter
24 account.

25 THE COURT: Okay.

1 MR. BENZION: May I approach, your Honor?

2 THE COURT: Yes.

3 BY MR. BENZION:

4 Q. Take a look at the front page, Mr. McGetchin, and look up
5 at me when you are done.

6 A. I read it.

7 Q. Does that refresh your recollection whether or not you
8 refer to yourself as a professor on your Twitter account?

9 A. I do.

10 Q. Do you refer to yourself as an FAU professor on the Twitter
11 account?

12 A. Yes.

13 Q. Do you have a disclaimer on the Twitter account that reads
14 that your opinions and comments do not represent official
15 university positions?

16 A. No, I do not.

17 Q. Do you consider yourself in violation of Article 5.3(d)?

18 A. I may be, I'm not sure.

19 Q. Do you believe you are violating the high ethical standards
20 at FAU by not having a disclaimer when you post online?

21 A. What was the first part? Am I --

22 Q. Are you violating high ethical standards at FAU by not
23 having a disclaimer on postings about matters of public
24 interest?

25 MR. FEICHT: Objection, vague.

1 *THE COURT:* If the witness understands the question,
2 you may answer. If you don't understand, I will ask the
3 attorney to rephrase.

4 *THE WITNESS:* I don't think I am in violation. I
5 would be willing to put one up there.

6 *BY MR. BENZION:*

7 Q. Has anyone ever asked you to put a disclaimer on your
8 Twitter?

9 A. No.

10 Q. Have you ever faced any disciplinary action in relation to
11 your lack of disclaimer on your publicly expressed opinions
12 about matters of public interest?

13 A. No.

14 *MR. FEICHT:* Objection, your Honor, mischaracterizes
15 the speech at issue.

16 *THE COURT:* Well, it's --

17 *MR. FEICHT:* Also leading.

18 *THE COURT:* I will overrule. He answered the
19 question.

20 *MR. BENZION:* There was an answer to that?

21 *THE COURT:* Yes, he said no.

22 *MR. BENZION:* No further questions.

23 *THE COURT:* Any cross-examination?

24 *MR. FEICHT:* Yes, your Honor, very briefly.

25 *THE COURT:* Okay.

CROSS-EXAMINATION

MR. FEICHT: May it please the Court.

THE COURT: Yes.

MR. FEICHT: Ladies and gentlemen of the jury.

BY MR. FEICHT:

Q. My name is Roger Feicht, I represent FAU. I have a few followup questions.

You serve as a member of the UFF FAU union?

A. Yes.

Q. And what is your position?

MR. BENZION: I object, outside the scope, your Honor. I didn't touch on any union matters. I apologize for speaking, sorry.

THE COURT: Well, the topic, generally, I don't know how much detail you are going to get into, there was no discussion about union activity, but the nature of the witness' work was brought up, so I will allow it, this question, but, you know, the nature of any activities within that association was not covered on direct. You may answer that question.

THE WITNESS: What was the question again, sir?

BY MR. FEICHT:

Q. Do you have a position with the UFF FAU union?

A. I do, grievance chair.

Q. Okay. As grievance chair, are you familiar with the saying comply and grieve?

1 MR. BENZION: Objection, outside the scope.

2 THE COURT: Response.

3 MR. FEICHT: If we need to go beyond the scope of
4 direct examination so we could avoid having to call Dr.
5 McGetchin in our case, that is fine. There are a few limited
6 matters.

7 THE COURT: Any objection?

8 MR. BENZION: Yes, this witness is not listed as a
9 witness for the Defendant.

10 THE COURT: Well, if he is not listed, you should stay
11 within the context of the direct examination.

12 MR. FEICHT: He did testify he would be willing to put
13 up a disclaimer, and we should explore --

14 THE COURT: He did make that statement. You may cover
15 anything he has said in direct on the cross-examination.

16 BY MR. FEICHT:

17 Q. Is the reason, sir, you would put up a disclaimer if a
18 university administrator asked you to do so to avoid a charge
19 of insubordination?

20 A. Yes.

21 Q. And are tenured faculty members subject to discipline,
22 including termination, if charged with insubordination?

23 A. Yes.

24 Q. Have you ever been instructed by an FAU administrator to
25 disclosure your Twitter account on the report of outside

1 activity or outside employment?

2 A. No.

3 Q. Are you familiar with that form?

4 A. Oh, yes, I use it all the time, every year.

5 Q. What do you disclose?

6 A. Usually outside lecturing, any kind of outside of my normal
7 duties, so any kind of -- I did a museum exhibit writeup, any
8 kind of class type thing, like for a synagogue. So, anything
9 that I am not directly paid for to do by FAU.

10 Q. And did you not disclose your Twitter account because you
11 consider it related to your assignment as a professor at
12 Florida Atlantic University?

13 A. No. I consider a Facebook and Twitter -- I consider it not
14 part of the -- I don't include that in my annual assignment, I
15 don't do much with them.

16 Q. You consider them personal in nature?

17 A. Well, I do post, like if I have a book come out, I will
18 post that. I wouldn't say it is completely personnel, I don't
19 do academic work on there, I don't do anything that is
20 really -- that I would report on my CV or annual assignment or
21 outside activities.

22 I could see if I did a lot of work on Facebook or on
23 Twitter, and if it affected my research, maybe I would want to
24 report it, but so far it is low level.

25 Q. Did you spend an hour to an hour and a half every single

1 day researching, writing articles on your Twitter account?

2 A. No.

3 MR. LEO: Objection, outside the scope.

4 THE COURT: Overruled. The nature of the Twitter
5 account was the nature of the direct. I will allow it on
6 cross.

7 THE WITNESS: No, I spend very little time on Facebook
8 and Twitter.

9 BY MR. FEICHT:

10 Q. Have you ever solicited donations on your Twitter account?

11 A. No.

12 Q. Have you ever received thousands of dollars through your
13 Twitter account?

14 A. That would be nice, but, no.

15 Q. If you did receive compensation, would you disclose it on
16 the outside activity form?

17 A. Absolutely, especially if it involved any kind of money.

18 Q. If you got paid, whether you call it compensation or
19 remuneration, if you got money, you would tell the university
20 about it?

21 A. Yes.

22 Q. That is to allow the university to determine whether or not
23 there is a conflict of interest through the money you are
24 receiving through outside activities and money you are
25 receiving from the taxpayers as a public institution professor?

1 A. Yes, public interest is to make sure I am focused on
2 teaching, doing research, doing service and not getting
3 sidetracked into competing activities.

4 Q. And you are also required to disclose the time commitment
5 that certain outside activities require, correct?

6 A. Yes. On the form it has the amount of time for any given
7 activity and then asks you to calculate it for the whole year,
8 so, yes, there is a time component.

9 MR. FEICHT: No further questions, your Honor, thank
10 you.

11 THE COURT: Anything on redirect?

12 MR. BENZION: Yes, your Honor, very brief.

13 **REDIRECT EXAMINATION**

14 BY MR. BENZION:

15 Q. Mr. McGetchin, do you sometimes post about international
16 connections between countries on your Twitter account?

17 A. Probably.

18 Q. That is the kind of stuff you teach about, right?

19 A. Yes. I teach world history, European, South Asia.

20 Q. So, are you saying you sometimes tweet about things that
21 you sometimes teach about?

22 A. Yes, and I do also post, I guess. When I have a book, I
23 tweet and post about that. A lecture, even an outside lecture
24 or a class for a semester, I put that on Facebook or Twitter.

25 Q. And you don't report those tweets that are related to your

1 discipline, right?

2 A. No, I have not reported Facebook or Twitter on the outside
3 report form.

4 Q. Even though sometimes your activity on there relates to
5 your discipline?

6 MR. FEICHT: Objection, leading.

7 THE COURT: Sustained.

8 BY MR. BENZION:

9 Q. Do you report activity on Facebook or Twitter that relates
10 to your discipline?

11 A. No.

12 Q. Do you have a disclaimer on every one of your tweets on
13 Twitter?

14 A. No.

15 MR. BENZION: No further questions.

16 THE COURT: Okay. All right. Thank you so much. You
17 may step down.

18 The Plaintiff may call your next witness.

19 MR. LEO: Your Honor, Plaintiff calls Douglas
20 Broadfield.

21 THE COURT: Anybody need to use the restroom?

22 THE JUROR: Yes.

23 THE COURT: All right. We will take a brief recess.
24 You may use the restroom and come back. Same instructions.

25 (Thereupon, the jury leaves the courtroom.)

1 *THE COURT:* Welcome back. Do you have your next
2 witness?

3 *MR. LEO:* The Plaintiff calls Douglas Broadfield.

4 DOUGLAS BROADFIELD, PLAINTIFF'S WITNESS, SWORN

5 *THE WITNESS:* Douglas Broadfield, D-O-U-G-L-A-S
6 B-R-O-A-D-F-I-E-L-D.

7 **DIRECT EXAMINATION**

8 *BY MR. LEO:*

9 *Q.* Good afternoon.

10 *A.* Good afternoon.

11 *Q.* Would you tell the jury where you work?

12 *A.* I work at the University of Miami.

13 *Q.* Did you ever work at Florida Atlantic?

14 *A.* I did.

15 *Q.* In what capacity?

16 *A.* I was professor of anthropology and contract enforcement
17 chair for the union.

18 *Q.* Can you explain that role, the contract enforcement chair?

19 *A.* In my role as the contract enforcement chair, I filed
20 grievances and represented faculty in cases where there was a
21 probable violation of the collective bargaining agreement.

22 *Q.* And how many years did you fill that role?

23 *A.* Approximately seven or eight years.

24 *Q.* How many faculty members would you say you represented at
25 the university in that time period?

1 A. I'm not sure, 50.

2 Q. And were you the only grievance contract enforcement chair
3 at the time?

4 A. I was.

5 Q. So, if there was a grievance, you would be the one to file
6 it?

7 A. That is correct.

8 Q. Would faculty members file their own grievances, or would
9 you file it for them?

10 A. If a faculty member was a member of the United Faculty of
11 Florida, and that would have been after about 2009 or 10, I
12 believe, I would file on their behalf.

13 At that point, 2009, 2010, if a faculty member was not a
14 member of United Faculty of Florida, they would have to file on
15 their own. I could help them, but they would have to represent
16 themselves and file on their own.

17 Q. For members like Professor Tracy, in 2013, you would file a
18 grievance for them if they had a problem?

19 A. Correct.

20 Q. Are you familiar with the outside activities/conflict of
21 interest policy at Florida Atlantic University?

22 A. I am.

23 Q. What is your understanding of that policy?

24 A. The outside activity policy is there for faculty or people
25 represented by the collective bargaining agreement to notify

1 the university when they plan on engaging in a professional
2 activity outside of their duties at the university.

3 At one point early on in my tenure that dealt primarily
4 with paid outside activity; later on, it included non-paid
5 activities if it conflicted with their assignment.

6 Q. During what years were you at FAU?

7 A. I was there from 2001 through the very beginning of 2015.

8 Q. So you were there for nearly 15 years?

9 A. Uh-hum.

10 Q. And over those years, were there any problems with the
11 conflict of interest policy that you are aware?

12 A. No. No. Never seemed to be a problem.

13 Q. Was the policy evenly applied to faculty members of the
14 university, if you know?

15 MR. FEICHT: Objection, foundation, and asks for the
16 opinion of a lay witness.

17 THE COURT: You can lay a foundation first if the
18 witness knows based on his position.

19 THE WITNESS: A --

20 THE COURT: Wait for the question.

21 BY MR. LEO:

22 Q. Dr. Broadfield, did you serve over the 15 years as the
23 grievance chair of the union?

24 A. I did.

25 MR. LEO: That is sufficient under 701.

1 *THE COURT:* What would be the next question then?

2 *MR. LEO:* If the policy was evenly applied to the
3 faculty members that you represented at the union.

4 *THE COURT:* You can ask the witness if he knows
5 whether it was or not.

6 *MR. FEICHT:* There is a relevance objection as well.
7 Dr. Broadfield left before the Plaintiff's discipline or
8 termination in 2015.

9 *THE COURT:* Overruled as to relevancy. You may ask
10 the witness whether he knows it was evenly applied, I think was
11 your question.

12 *BY MR. LEO:*

13 *Q.* Do you know whether the policy was evenly applied while you
14 were working at the university?

15 *A.* In my experience with the faculty I had contact with, I
16 don't think that it was applied evenly across all members of
17 the university.

18 *Q.* Why is that?

19 *A.* There were faculty who filed outside activity forms for, in
20 particular, paid activities and those certainly seemed like the
21 university had signed off on, but there were also faculty who
22 engaged in outside employment who never filed and they have
23 been known, in my knowledge, by a chair or somebody like that
24 to have been doing outside activity and never told to file or
25 required to file.

1 Q. And those faculty members who did not turn in forms while
2 you were there, were they disciplined for not filing forms?

3 A. Not to my knowledge.

4 Q. As far as Dr. Tracy, you did represent him in 2013 as
5 grievance chair?

6 A. I did.

7 Q. You are familiar with the discipline?

8 A. Yes.

9 Q. Did Professor Tracy violate 5.3(e)?

10 A. In my opinion, and the way the union represented him, was
11 that no, he didn't violate that article.

12 Q. Isn't it true that Michael Moats -- the service unit
13 director at the time, right?

14 A. Correct.

15 Q. Isn't it true that Michael Moats told Professor Tracy in
16 2013, he should not turn in a report of outside employment form
17 in terms of his blog?

18 MR. FEICHT: Objection, leading.

19 THE COURT: It is leading and it does call for a
20 statement of somebody outside. It would be hearsay unless you
21 are arguing something other than that. If not, it is
22 sustained.

23 BY MR. LEO:

24 Q. Are you aware of any advisement by the union with respect
25 to Professor Tracy's blogging and whether he was advised by the

1 union to turn in the form for the blog in 2013?

2 MR. FEICHT: Objection.

3 THE COURT: Well, you can't speak about what someone
4 said outside of court, so you have to rephrase your question so
5 it doesn't call upon the witness to give an answer that is
6 based on hearsay.

7 BY MR. LEO:

8 Q. Who is Michael Moats?

9 A. Michael Moats was the state UFF representative for the
10 southern area of Florida.

11 Q. And did you work with Michael Moats at the union at FAU?

12 A. Yes, I did.

13 Q. And did Michael Moats, in 2013, advise Professor Tracy if
14 you are aware?

15 MR. FEICHT: Objection, calls for hearsay.

16 THE COURT: The fact of advising, I will allow that
17 yes or no, but not any content. You can answer the question,
18 whether you are aware whether Moats advised Tracy, yes or no,
19 if you are aware.

20 THE WITNESS: Yes.

21 BY MR. LEO:

22 Q. And are you aware of whether or not Professor Tracy
23 followed Michael Moats' advice in 2013?

24 A. In the sense of what Dr. Tracy told me.

25 Q. And what was that?

1 A. That --

2 MR. FEICHT: Objection, your Honor, hearsay.

3 THE COURT: Yes, that would be.

4 BY MR. LEO:

5 Q. Without telling us what Professor Tracy told you, are you
6 aware whether he followed Mr. Moats' advice?

7 A. Yes.

8 Q. Did he?

9 A. Yes.

10 MR. LEO: No further questions at this time.

11 THE COURT: Okay, any cross-examination?

12 MR. FEICHT: Yes. Your Honor.

13 THE COURT: Okay.

14 MR. FEICHT: I have followup questions.

15 **CROSS-EXAMINATION**

16 BY MR. FEICHT:

17 Q. While serving as the grievance chair for the union, you
18 considered yourself as an advocate for Professor Tracy?

19 A. Yes.

20 Q. You considered Professor Tracy a friend, right?

21 A. That is correct.

22 Q. Professor Tracy is someone you were friends with and you
23 had a responsibility to protect in your role as grievance
24 chair, right?

25 A. Yes.

1 Q. And Professor Tracy is the former president of the UFF FAU
2 union, right?

3 A. Correct.

4 Q. And as the president of the UFF FAU union, he actually
5 signs the collective bargaining unit; is that right?

6 A. That is right.

7 Q. Do you recall Professor Tracy trying to revise the language
8 of Article 19 about the disclosure of professional activities
9 before he signed that CBA as president?

10 A. I don't recall him doing that.

11 Q. After you left FAU in January, was it of 2015, did you have
12 any involvement whatsoever in Professor Tracy's disclosure or
13 nondisclosure of his outside activities?

14 A. No.

15 Q. After you left FAU for the illustrious University of Miami
16 in January 2015, did you have any decision in the ultimate
17 discipline of termination of Professor Tracy?

18 A. No.

19 Q. You testified you were not aware of other faculty members
20 not being disciplined for outside activities?

21 A. To my knowledge.

22 Q. Did you receive copies of all of the reports of outside
23 activities that were filed by any faculty member at FAU?

24 A. No.

25 Q. Did you have access to every faculty member's annual

1 assignment that would show which activities were part of the
2 assignment and not potentially reportable outside activities?

3 A. No.

4 Q. Do you recall any faculty members at FAU that were
5 instructed by their supervisors specifically to report a
6 particular activity on reports of outside activity?

7 A. Yes.

8 Q. And what did those other faculty members other than Dr.
9 Tracy do?

10 A. All of them except one filed an outside activity form.

11 Q. The one that didn't fill it out, they were subject to
12 discipline, correct?

13 A. Not that I am aware of.

14 Q. Who is this other faculty member?

15 A. It was an English instructor.

16 Q. As far as you know, if a faculty member is instructed in
17 writing by their supervisor repeatedly to disclose professional
18 activity, they disclosed that activity, correct?

19 A. To my knowledge, yes.

20 Q. Okay. Have you ever heard of Mrs. Copeland at FAU?

21 A. The name --

22 MR. BENZION: Objection, outside the scope and
23 relevance.

24 MR. FEICHT: He testified as to his knowledge of which
25 faculty members were subject to discipline.

1 *THE COURT:* I will overrule the objection. The
2 subject matter in terms of how the policy was applied across
3 all faculty and what some faculty did and others didn't do, I
4 will allow it.

5 *MR. BENZION:* May I object to relevancy?

6 *THE COURT:* You may.

7 *MR. BENZION:* Dr. Broadfield was not at the university
8 at the time of the Copeland discipline. He doesn't have
9 personal knowledge.

10 *THE COURT:* Let's see what the questions are. You are
11 not to speculate or make any assumptions, only personal
12 knowledge.

13 *BY MR. FEICHT:*

14 *Q.* Isn't it true, Dr. Broadfield, you are not aware there is a
15 faculty member at FAU, Ms. Copeland, who, like Professor Tracy,
16 was terminated for insubordination and misconduct relating to
17 her failure to accurately complete the outside activity forms
18 after being instructed to do so in writing by a supervisor?

19 *A.* I have no knowledge of that.

20 *Q.* Okay. As a former grievance chair for FAU, are you
21 familiar with the common advice or strategy to comply and then
22 grieve?

23 *A.* Yes.

24 *Q.* Would you explain to the jury what that phrase means?

25 *A.* It means that the employee, if they disagree with an order

1 that is given to them by a supervisor, that they should follow
2 through and complete that request or order and if they disputed
3 it, then they can grieve it while that is going on.

4 Q. And isn't it true, sir, that the purpose of this comply and
5 then grieve is so the faculty member cannot be charged with
6 insubordination and subject to discipline by the university?

7 A. That would be true.

8 Q. And that is advice you gave to professor Tracy in 2013,
9 isn't it? You told him it would be smart to comply and grieve,
10 right?

11 A. I did.

12 Q. Okay. You talked about the outside activity policy. Are
13 you familiar with the report of outside employment or outside
14 activity form?

15 A. Very.

16 Q. Okay. When you advised FAU faculty, including but not
17 limited to Dr. Tracy, regarding that outside activity form as
18 the grievance chair, was it your advice that if they were
19 unsure whether a particular activity required disclosure, that
20 they should fill out the form?

21 A. Yes.

22 Q. So, in other words, when in doubt, fill it out, right?

23 A. Correct.

24 Q. When you were advising Professor Tracy in 2013, did you
25 rely on him to tell you honestly about what he was doing in

1 terms of his outside activities?

2 A. I asked him -- I asked him what he was doing.

3 I didn't ask him to answer truthfully or anything
4 specifically. It was more of just a conversation.

5 Q. You took him at his word in order to provide him advice as
6 the grievance chair?

7 A. Sure.

8 Q. If a faculty member is expected to receive compensation for
9 outside activity they should report that on the outside
10 activity report?

11 A. Yes.

12 Q. Did Professor Tracy tell you he was earning thousands of
13 dollars through the memoryhole blog?

14 MR. BENZION: Objection, mischaracterization.

15 MR. FEICHT: I can show him the pickups, your Honor.

16 MR. BENZION: What exhibit is that?

17 MR. FEICHT: 269.

18 THE COURT: Counsel's conversation is not on the
19 record. Let us know when you go back on the record.

20 MR. FEICHT: This is exhibit 216-I.

21 MR. BENZION: The objection is mischaracterization.
22 Counsel is not willing to misrepresent that it does fit the
23 description he described.

24 MR. FEICHT: Dr. Tracy described. That is in
25 evidence.

1 *THE COURT:* Ask the question again without any type of
2 characterization, just ask the question.

3 *MR. FEICHT:* Sure.

4 *BY MR. FEICHT:*

5 *Q.* Did Dr. Tracy ever tell you that he received money through
6 PayPal for his memoryhole blog?

7 *A.* No.

8 *Q.* Would that have been relevant information based on your
9 understanding of the outside activity policy, to know whether
10 or not he was soliciting and receiving money?

11 *A.* It would have been relevant.

12 *MR. FEICHT:* Can I publish 216-I, your Honor.

13 *BY MR. FEICHT:*

14 *Q.* Doctor, you are not aware of Professor Tracy receiving
15 donations for the purpose of the Memoryhole Independent
16 Research Fund?

17 *A.* Not that I recall.

18 *Q.* Okay. Dr. Tracy never told you there was a donate now
19 button on his blog?

20 *A.* I -- he didn't.

21 *MR. BENZION:* Objection, facts not in evidence,
22 mischaracterization.

23 *MR. FEICHT:* Donate now is in evidence.

24 *THE COURT:* Overruled.

1 *BY MR. FEICHT:*

2 *Q.* Did Professor Tracy tell you about other outside activities
3 he was engaged in other than the memoryhole blog?

4 *A.* Yes.

5 *Q.* What else did he tell you about?

6 *A.* I believe he told me about writing ED for another site, I
7 believe.

8 *Q.* Global Research?

9 *A.* I think so, yes.

10 *Q.* What about his radio podcast, did he tell you about his
11 Real Politik radio podcast?

12 *A.* Real Politik rings a bell, I don't recall a conversation
13 about the podcast.

14 *Q.* Did Professor Tracy tell you he often recorded his radio
15 podcast in his FAU office using FAU university resources?

16 *A.* No.

17 *Q.* Okay. Did Professor Tracy tell you that his blog articles
18 that he wrote for the memoryhole blog were part of a
19 contribution for a book Nobody Died at Sandy Hook that was
20 offered for sale on amazon.com?

21 *A.* No.

22 *MR. FEICHT:* May I approach, your Honor?

23 *THE COURT:* Yes.

24 *BY MR. FEICHT:*

25 *Q.* Dr. Broadfield, I am handing you Defendant's 61. Are those

1 emails you exchanged with Professor Tracy?

2 A. Yes.

3 Q. In 2013, did you tell Dr. Tracy that he should assure the
4 university that he is not writing his blog on university time
5 or using university equipment?

6 A. Yes.

7 Q. And if Professor Tracey was using his FAU computer to do
8 research for his blog or for Global Research and recorded his
9 radio podcast in the FAU office, would you tell him not to use
10 the resources without first disclosing that in writing to the
11 university?

12 MR. BENZION: Objection to the hypothetical.

13 THE COURT: Overruled.

14 THE WITNESS: I would have told him not to use
15 university resources.

16 BY MR. FEICHT:

17 Q. Why is that?

18 A. Under the collective bargaining agreement, you are not to
19 use those for outside activity.

20 Q. He never told you he used his iMac computer for Global
21 Research?

22 A. No.

23 Q. And he never told you anything about interviewing people
24 for the podcast in his office using his iMac computer?

25 A. No.

1 Q. Okay.

2 MR. FEICHT: Your Honor, may I publish 15 in evidence?

3 THE COURT: Yes. To be clear, 61 is marked for ID.

4 Which one do you want to publish?

5 MR. FEICHT: 15.

6 THE COURT: All right, as long as it is in evidence.

7 This is Defense's?

8 MR. FEICHT: Yes.

9 BY MR. FEICHT:

10 Q. If you look to page three, last page, did you get a copy of
11 this memorandum from Heather Coltman?

12 A. I did.

13 Q. Okay. And are the statements from Dean Heather Coltman and
14 Professor Tracy to you accurate, sir?

15 A. Yes.

16 Q. While at FAU, you worked with Dean Heather Coltman for
17 several years, right?

18 A. I did.

19 Q. Did you find Dean Heather Coltman to be honest and easy to
20 work with?

21 A. I did.

22 Q. Are you aware Professor Tracy taught a class entitled
23 Culture of Conspiracy?

24 A. I never looked at his classes.

25 Q. Did you ever look at his blog articles?

1 A. No.

2 Q. Did you ever look to determine whether there was overlap
3 between the subjects he taught in the Culture of Conspiracy
4 class and the topics he addressed on the blog, radio podcast or
5 his book?

6 A. Never compared them, no.

7 Q. If Professor Tracy's research or work for the blog
8 contributed to his assigned research or other professional
9 activities at FAU, would you agree Professor Tracy would have
10 to record that in the report of outside activity?

11 MR. BENZION: Objection, vague.

12 THE COURT: Overruled.

13 THE WITNESS: That is difficult for me to answer. If
14 you are asking what he wrote on his website was used in the
15 classroom, then, that would -- it would be difficult for me
16 saying he was doing his blog as research for class or, you
17 know, if they were intermingled or something.

18 BY MR. FEICHT:

19 Q. Are you aware of Dr. Tracy ever disclosing his memoryhole
20 blog as part of his assignment at FAU?

21 A. Not to my knowledge.

22 Q. Okay. If he did not do that, but his research for his blog
23 or radio show or book contributed to the research or teaching
24 that he was doing before for FAU, would you agree Professor
25 Tracy would have reported that to the university as report of

1 outside activity?

2 A. I am not sure that would be required under that article.

3 MR. FEICHT: May I approach?

4 THE COURT: Yes.

5 BY MR. FEICHT:

6 Q. I show you your deposition, page 00, lines 16 through 20.

7 A. Yes.

8 Q. Does that refresh your recollection if Professor Tracy's
9 activity was research for his blog, he should have reported
10 that on the report of outside activity?

11 A. If it conflicted with the activity.

12 Q. Wouldn't the university need to know what the activity was
13 to determine whether it was a conflict of interest or conflict
14 of time?

15 A. That is difficult to say. You could argue that is
16 something similar to serving on an editorial board.

17 Q. Did Professor Tracy disclose that he was doing this work to
18 the university in a report, on an outside activity report, to
19 your knowledge?

20 A. No.

21 Q. If Professor Tracy was receiving compensation or using
22 university resources for his outside activities he would have
23 had an obligation to report it to the university in a record of
24 outside activity, correct?

25 A. Correct.

1 MR. FEICHT: No further questions, thank you.

2 THE COURT: Okay, anything further on redirect?

3 **REDIRECT EXAMINATION**

4 BY MR. LEO:

5 Q. Dr. Broadfield, there was a discussion about the outside
6 activities policy, with the exceptional use. Are you familiar
7 with that?

8 A. Yes.

9 Q. How does that work?

10 A. If university equipment is being used incidentally in a
11 manner that would be consistent among all faculty, essentially,
12 then you don't have to file for outside activity or in this
13 case, use of equipment.

14 Q. If there is no additional expense to the university, right?

15 MR. FEICHT: Objection, leading.

16 THE WITNESS: Correct.

17 THE COURT: Sustained. You may rephrase.

18 BY MR. LEO:

19 Q. I will ask a different question. Do faculty members at the
20 university report use of their computer to communicate online?

21 A. They do not.

22 Q. Was there any training at the university with respect to
23 reporting a blog or use of the computer while you were there
24 for 15 years?

25 MR. FEICHT: Outside the scope.

1 *THE COURT:* Overruled.

2 *THE WITNESS:* Not to my knowledge.

3 *BY MR. LEO:*

4 *Q.* You represented Professor Tracy in 2013?

5 *A.* I did.

6 *Q.* Did you have an opinion about the discipline merit --

7 *MR. FEICHT:* I object, this is outside cross, I did
8 not ask about any opinion.

9 *THE COURT:* Just a moment.

10 Well, on cross the subject matter of the 2013
11 representation and the advice that was given to Dr. Tracy was
12 discussed, so I think this is within that scope. So you may
13 ask -- you need to slow your questions down, you are talking
14 fast. Restate the question. State it again.

15 *BY MR. LEO:*

16 *Q.* In 2013, when Professor Tracy was disciplined for not
17 having a disclaimer on his blog, or a sufficient disclaimer,
18 did you have an opinion whether there was merit to that
19 discipline?

20 *A.* I did.

21 *Q.* And what was that opinion?

22 *A.* I felt it was unwarranted.

23 *MR. LEO:* Could we publish 2-A, please.

24 *MR. FEICHT:* Objection, scope and personal knowledge.
25 He was not at these meetings, they were not discussed on cross.

1 *THE COURT:* That is true.

2 *MR. LEO:* Your Honor, if I may.

3 *THE COURT:* That is true. Why don't you take the
4 document down first and let the Court know what you want.

5 *MR. LEO:* Opposing counsel asked about the credibility
6 of Heather Coltman. I would like to ask this witness if he saw
7 her notes in 2013.

8 *THE COURT:* You can ask that question.

9 *MR. LEO:* May we publish, your Honor?

10 *THE COURT:* Yes.

11 *BY MR. LEO:*

12 *Q.* 2-A. Did you see Heather Coltman's notes in 2013?

13 *A.* I did not.

14 *Q.* If I could direct your attention --

15 *MR. FEICHT:* Outside personal knowledge.

16 *THE COURT:* He said he did not see them. You can ask
17 questions, but not particular to the notes.

18 *MR. LEO:* I would like to ask what Dr. Broadfield
19 would think had he seen this note at this time.

20 *THE COURT:* I will not allow that, he doesn't have
21 personal knowledge of the notes. Ask questions about what the
22 witness knows.

23 *MR. LEO:* For the record, your Honor, opposing counsel
24 was permitted to ask about activities that occurred after his
25 representation which he had no personal knowledge as well, and

1 that was permitted.

2 THE COURT: Yes, but I will not allow you to ask him
3 about a document that he doesn't have personal knowledge of.
4 Try your question --

5 MR. LEO: Your Honor, I want to be clear, they put
6 PayPal receipts in front of him, he had no personal knowledge
7 about that, he was permitted to testify about them.

8 THE COURT: What is the question you want to ask the
9 witness?

10 MR. LEO: If he had seen the notes --

11 THE COURT: Ask him the question.

12 BY MR. LEO:

13 Q. Dr. Broadfield, if you had seen Heather Coltman's notes on
14 what their objectives were at the university, would that change
15 your opinion about Heather Coltman, perhaps?

16 MR. FEICHT: Objection, lack of foundation, calls for
17 speculation, personal knowledge as well.

18 THE COURT: I am going to sustain.

19 BY MR. LEO:

20 Q. You represented Professor Tracy in 2013, right?

21 A. I did.

22 Q. Do you still have the PayPal up there?

23 Can you tell us the dates? Would you skim through there.

24 Are there any PayPal receipts in the document in front of
25 you from the time that you represented Professor Tracy in 2013?

1 A. I don't see any.

2 Q. Would you agree Professor Tracy could not tell you about
3 something that did not happen in 2013?

4 A. Yes.

5 Q. And if Professor Tracy wasn't podcasting in 2013, would you
6 admit he couldn't tell you about it?

7 A. Correct.

8 Q. When you mean advisement at Florida Atlantic University, is
9 that considered a directive from a superior or supervisor at
10 the university?

11 A. Not in any way.

12 Q. Do union members have to follow all advisements?

13 A. No.

14 Q. Would you consider a request of clarification from a
15 supervisor by a faculty matter insubordination?

16 MR. FEICHT: Lack of foundation and outside cross.

17 THE COURT: Overruled.

18 THE WITNESS: I think it would be perfectly fine for a
19 faculty member, I advised faculty members when I was there to
20 do that.

21 BY MR. LEO:

22 Q. If a faculty member asked for clarification, should they be
23 disciplined for that?

24 A. Not for clarification, no.

25 Q. Did you know in 2013, Heather Coltman had written a note,

1 First Amendment, find winning metaphors?

2 MR. FEICHT: Objection, hearsay, personal knowledge.

3 We have addressed this.

4 THE COURT: Yes, sustained. I sustained that
5 objection.

6 BY MR. LEO:

7 Q. Would you agree with me, Dr. Broadfield, that donations one
8 receives without doing anything for them would not be
9 compensation?

10 MR. FEICHT: Objection, leading.

11 THE COURT: Sustained.

12 BY MR. LEO:

13 Q. Is there a difference between donations and compensation,
14 Dr. Broadfield?

15 MR. FEICHT: Objection, vague.

16 THE COURT: Overruled. The witness can answer if he
17 is able to.

18 THE WITNESS: Depending on how the donations were
19 used, I would say there is a difference.

20 BY MR. LEO:

21 Q. Would a donation be considered compensation under the
22 university's outside activities policy pursuant to the
23 guidelines?

24 A. That is difficult to say.

25 MR. LEO: Thank you, no further questions.

1 *THE COURT:* Okay. Thank you very much. You may step
2 down.

3 Is there another witness the Plaintiff --

4 *MR. LEO:* Yes, your Honor.

5 *THE COURT:* A short witness so our jury is able to
6 leave by 5:30?

7 *MR. BENZION:* That is the goal.

8 *THE COURT:* Okay. Work your direct out in such a way
9 that there is cross and redirect so we are concluded by 5:30.
10 Speed but slow.

11 *MR. LEO:* The Plaintiff calls Christopher Robe.

12 *THE COURT:* Okay.

13 CHRISTOPHER ROBE, PLAINTIFF'S WITNESS SWORN

14 *THE WITNESS:* Christopher Robe, R-O-B-E.

15 **DIRECT EXAMINATION**

16 *BY MR. BENZION:*

17 *Q.* Good afternoon, Mr. Robe.

18 *A.* Hi.

19 *Q.* Do you currently work at Florida Atlantic University?

20 *A.* I do.

21 *Q.* Did you work at Florida Atlantic in 2013?

22 *A.* Yes.

23 *Q.* 2014?

24 *A.* Yes.

25 *Q.* 2013?

1 A. Yes.

2 Q. How long have you worked there?

3 A. Fifteen years.

4 Q. What is your title?

5 A. Associate professor.

6 Q. As an associate professor, are you required to comply with
7 all of the policies and regulations of the school?

8 A. Yes.

9 Q. Does that include Article 5 of the collective bargaining
10 agreement?

11 A. Which is what -- yes, I do. Yes.

12 Q. All the articles?

13 A. All the articles.

14 Q. And do you consider yourself to be in compliance with the
15 articles of the collective bargaining agreement?

16 A. Yes.

17 Q. Are you required to comply with the conflicts of
18 interest/outside activities policy?

19 A. Yes.

20 Q. Do you believe you are in compliance with that policy?

21 A. I do.

22 Q. What do you teach at Florida Atlantic University?

23 A. I teach film and media studies.

24 Q. Can you elaborate on what film and media studies is just
25 briefly, sir?

1 A. Uh-huh. So, you teach partially history, partially film
2 theory, how to watch film, some kind of formal techniques, not
3 the production aspect, the study side of it, history theory.

4 Q. Do you ever publish articles relating to your discipline?

5 A. Yes.

6 Q. Is every article you publish relating to your discipline
7 part of your annual assignment?

8 A. It depends on how you define assignment, but -- they are
9 all related, yes.

10 Q. Related, but do you submit them as part of your annual
11 assignment to be the official part --

12 A. No, some count and some don't.

13 Q. Do you sometimes publish peer reviewed articles relating to
14 your discipline?

15 A. Yes.

16 Q. Do you sometimes publish non-peer reviewed articles
17 relating to your discipline?

18 A. Yes.

19 Q. Can you maybe briefly explain the difference between peer
20 reviewed articles and non-peer reviewed?

21 A. Peer reviewed is reviewed by people in your field, usually
22 people -- people who do know your name, and they offer feedback
23 in terms of whether this meets scholarly standards in your
24 discipline. They get back to you and they approve or
25 disapprove.

1 Non-peer reviewed, you are not having it reviewed by
2 scholars in your field, you may have different reasons for
3 doing that.

4 Q. Have you ever published non-peer reviewed articles related
5 to your discipline online?

6 A. Yes.

7 Q. When I say online, have you ever published non-peer
8 reviewed articles related to your discipline on your blog?

9 A. I don't have a blog.

10 Q. What do you have?

11 A. Facebook.

12 Q. Do you have a website?

13 A. No, I don't.

14 Q. What is Jump Cut Review of Temporary Media?

15 A. That is a peer review academic site.

16 Q. Online?

17 A. Yes.

18 Q. Do you sometimes post articles there?

19 A. Yes, but that is peer reviewed.

20 Q. I was asking about non-peer?

21 A. Yes.

22 Q. Let's focus on the Jump Cut website. You post peer
23 reviewed articles on there?

24 A. Yes.

25 Q. Do you report on the report of outside activities forms

1 those articles that you post online?

2 A. No. That is part of my assignment.

3 Q. Let's talk about the non-peer reviewed articles, do you
4 post online?

5 A. Right.

6 Q. Do you post them on your Facebook?

7 A. Well, I mean, I distribute them on Facebook, they are
8 published somewhere else.

9 Q. Where are they published online?

10 A. Film reviews with a film scholar, one is called Pop
11 Matters.

12 Q. Is that visible by the public?

13 A. Yes.

14 Q. Anyone can see it, right?

15 A. Uh-hum.

16 *THE COURT:* You have to answer yes or no.

17 *THE WITNESS:* Yes.

18 *BY MR. BENZION:*

19 Q. The non-peer review articles that you publish online, do
20 you post those on your outside activity/professional employment
21 forms?

22 A. No.

23 Q. Why not?

24 A. That is part of my discipline, writing film reviews.

25 Q. So, is it your understanding you are not to publish those

1 under the conflict of interest/outside activities?

2 A. Yes, to my understanding. If it were otherwise, I would.

3 Q. Has anyone told you you are to report the articles on the
4 form?

5 A. No.

6 Q. Have you had any -- given any kind of training with respect
7 to what you should do with your online publications that are
8 not part of your assignment?

9 A. Training from whom?

10 Q. From the administration or your media supervisors all the
11 way up to the Provost.

12 A. No.

13 Q. Have you ever been given any in-person training on how to
14 comply with the conflict of interest/outside activities policy?

15 A. Can you repeat that?

16 Q. Have you ever received in-person training on how to comply
17 with the conflict of interest/outside activities policy?

18 A. No.

19 Q. Has the policy ever confused you?

20 A. Absolutely.

21 Q. Why is that?

22 A. It seemed to be applied differently at different times. I
23 was union president in 2013, and I first became aware of it
24 with instructors who were teaching outside at other
25 universities. Quite honestly, FAU was not paying them enough

1 money, and suddenly this outside activity form, instructors in
2 English, and so I became aware of it then, the way it was being
3 applied.

4 Q. Okay. Was it being applied consistently as you experienced
5 it?

6 A. I don't know what people are doing outside. It didn't
7 appear to be, but I am not aware of what people's outside
8 activities are. It is hard to determine.

9 Q. Are you saying even though you were once the union
10 president, you don't understand the conflict of
11 interest/outside activities policy?

12 MR. FEICHT: Objection. He said he doesn't have
13 personal knowledge which outside activities are being engaged
14 in.

15 THE COURT: The question is about the policy itself.

16 MR. BENZION: The witness' own knowledge about the
17 policy.

18 THE COURT: I will overrule.

19 BY MR. BENZION:

20 Q. The question is, are you saying as former president of the
21 UFF FAU union, a position that Dr. Tracy once held, that you
22 still don't necessarily understand the conflict of
23 interest/outside activities policy?

24 A. Yes, it was very unclear.

25 MR. BENZION: No further questions, your Honor.

1 THE COURT: Okay, any cross-examination?

2 MR. FEICHT: Yes, your Honor.

3 **CROSS-EXAMINATION**

4 BY MR. FEICHT

5 Q. Good afternoon, my name is Roger Feicht, I represent FAU.

6 You are friends with the Plaintiff, Professor Tracy, right?

7 A. Yes, I have been.

8 Q. You are, like him, a former president of the UFF FAU union?

9 A. Correct.

10 Q. And like Dr. Tracy, you signed the collective bargaining
11 agreement on behalf of the union for the time period you were
12 president?

13 A. Yes.

14 Q. Are you aware of Dr. Tracy raising any objections to
15 Article 19 of the collective bargaining agreement regarding
16 reporting of outside activities?

17 A. In 2013, yes -- no, sorry, no, no. Not at that time, no.
18 Well -- can I add something there?

19 It did come up, you know, during then, 2013, yes, it did
20 come up then.

21 Q. What about when Dr. Tracy signed the CBA during his role as
22 president of UFF, during that collective bargaining process and
23 when the language in Article 19 was included in the CBA, and
24 Dr. Tracy affixed his signature, did he raise any objections
25 before he signed?

1 A. No.

2 Q. If you were told otherwise, you would report outside
3 activities that aren't subject to peer review, right?

4 A. Right.

5 Q. Is that if a supervisor told you to do something, you would
6 do it in order to avoid a charge of insubordination?

7 A. I guess.

8 Q. And employers can discipline employees who are
9 insubordinate and don't respond to supervisors?

10 A. Correct.

11 Q. You testified the outside activity report is unclear. I
12 want to show you what has been admitted as Defendant's Exhibit
13 25.

14 Could we have the HDMI, please.

15 Do you see that provision I have sloppily highlighted on
16 Exhibit 25?

17 A. Yes.

18 MR. BENZION: Objection, lack of foundation, lack of
19 personal knowledge.

20 THE COURT: What was the question as to this document?

21 MR. FEICHT: I first asked him if he saw this
22 highlighted provision. This is a document in evidence.

23 THE COURT: The witness may answer that question.

24 THE WITNESS: Yes.

25

1 BY MR. FEICHT:

2 Q. And you testified that some portions of the policy were
3 unclear. Does this directive in Defendant's 25 make it clear
4 that FAU expected within 48 hours for Dr. Tracy to acknowledge
5 the receipt of the annual assignment through the FAIR system
6 and submit reports of outside activity forms for three years?

7 A. Could you repeat the question again?

8 Q. Sure. Does this highlighted portion within Defendant's
9 Exhibit 25 clearly show that the university was requesting Dr.
10 Tracy to acknowledge receipt of his annual assignment and
11 submit his reports of outside activity forms for three years
12 within 48 hours of the Notice of Discipline?

13 A. Yes.

14 MR. BENZION: Objection, lack of personal knowledge,
15 lack of foundation. This is the same issue with the last
16 exhibit and the last exhibit.

17 THE COURT: I thought the witness said he was familiar
18 with those provisions.

19 MR. BENZION: Not this writing, this is an issue we
20 had with the last witness.

21 MR. FEICHT: On direct he testified he was president
22 of the union and he was familiar and he was asked about the
23 outside activity form and policies.

24 THE COURT: You may ask about the outside activities
25 form and the policies.

1 BY MR. FEICHT:

2 Q. FAU directed Professor Tracy in 2015 to submit those forms,
3 correct?

4 MR. BENZION: Objection, lack of personal knowledge,
5 lack of foundation.

6 MR. FEICHT: The document speaks for itself.

7 MR. BENZION: This is the issue with the last witness.

8 THE COURT: Find a different way to ask the question.

9 BY MR. FEICHT:

10 Q. Is there anything unclear about the directive to Dr. Tracy
11 in this Notice of Discipline regarding their expectations for
12 him to submit his report of outside employment/outside activity
13 forms?

14 A. I am reading the document now.

15 Q. Sure.

16 MR. BENZION: Same objection, your Honor.

17 THE WITNESS: I don't mean what you mean by clear, you
18 know.

19 THE COURT: I will have you move on. I sustain the
20 objection.

21 MR. FEICHT: Sure, your Honor.

22 BY MR. FEICHT:

23 Q. Professor Robe, if a faculty member is using equipment for
24 outside activities would you agree the faculty member must
25 disclose that use to the university in a report of outside

1 activity?

2 A. Yes.

3 Q. You personally saw Professor Tracy before his discipline
4 with equipment in his office at FAU for outside activities,
5 correct?

6 A. Yes.

7 Q. He was doing interviews for his podcast and --

8 A. I --

9 MR. BENZION: Objection, lack of personal knowledge
10 and lack of foundation.

11 MR. FEICHT: He personally saw this.

12 THE COURT: If you have personal knowledge, you may
13 answer.

14 THE WITNESS: I never saw him do it. He had equipment
15 there.

16 BY MR. FEICHT:

17 Q. And you personally, as a friend, a colleague, fellow union
18 member, knew that it was not a good idea to have equipment in
19 his office to engage in his outside activities; isn't that
20 correct, sir?

21 A. Correct.

22 Q. You were asked on direct about your online activities.

23 Have you ever received compensation through your Facebook
24 account?

25 A. No.

1 Q. Have you ever received compensation for any of the articles
2 that you posted on that film review website?

3 A. No.

4 Q. Is it your understanding, sir, that if a professor is
5 receiving compensation through outside activities they have an
6 obligation to report that to FAU?

7 A. Yes.

8 Q. Are you aware Professor Tracy received \$2,000 through his
9 memoryhole blog?

10 A. No.

11 Q. FAU has a legitimate interest in its faculty members
12 disclosing outside activities and other compensated activities
13 to be able to assess possible conflicts of interest and
14 possible conflicts of time?

15 A. Correct.

16 Q. And the CBA that you and Professor Tracy signed requires
17 activities, those compensated and using university resources,
18 to be reported in the outside activity form?

19 A. Yes, but never specified what constituted outside activity.

20 Q. If an activity is compensated, is it your understanding it
21 should be disclosed?

22 A. Not really, no.

23 Q. You just testified that if you receive money for your
24 Facebook, you should disclose it?

25 A. Listen, it depends -- outside activities, yes.

1 Q. If you are not getting paid from FAU, and you are getting
2 compensation from somebody else, as a public institution, you
3 are getting paid by a taxpayer, you should disclose when you
4 are receiving compensation from outside activities?

5 A. Yes.

6 MR. FEICHT: Nothing further.

7 THE COURT: Was that a yes?

8 THE WITNESS: Yes.

9 THE COURT: Redirect.

10 **REDIRECT EXAMINATION**

11 BY MR. BENZION:

12 Q. Have you ever turned in a conflict of interest/outside
13 activities form?

14 A. I have not.

15 Q. How many years were you there?

16 A. 13.

17 Q. Never turned in a form?

18 A. No.

19 Q. Have you ever been insubordinate?

20 A. No.

21 Q. Have you ever been disciplined for not turning in the
22 forms?

23 A. No.

24 Q. Has anyone made a demand of you to turn in the forms?

25 A. No, they haven't.

1 Q. Do you see a differences in receiving pay for performing a
2 service versus receiving a donation?

3 A. Yes.

4 Q. Do you know whether or not donations are reportable under
5 the conflict of interest/outside activities policy?

6 A. I do not.

7 Q. Do you believe requesting clarification from your
8 supervisor would be insubordination at Florida Atlantic
9 University?

10 A. No.

11 Q. Why not?

12 A. Because it is logical what a person wants, you do it
13 correctly.

14 Q. Would a directive from a supervisor to fill out outside
15 activity forms be more clear or less clear if the directive
16 included in it a request for specific activity?

17 A. Could you ask that again for me? I am sorry.

18 Q. I will try.

19 Would a directive from a supervisor be more clear or less
20 clear if it included a specific request for a specific activity
21 to be on the outside activity form?

22 A. More or less, I don't know. Compared to what?

23 Q. To just a request to fill out a form.

24 A. It would be about the same.

25 Q. A request, a request for a specific activity would be the

1 same as a request to fill out a form?

2 MR. FEICHT: Objection, cumulative, improper
3 hypothetical.

4 THE COURT: Overruled.

5 THE WITNESS: Say that again.

6 MR. BENZION: No further questions, your Honor.

7 THE COURT: Okay, all right, thank you very much. You
8 may step down.

9 Are there any other Plaintiff witnesses?

10 MR. LEO: No, your Honor, Plaintiff rests.

11 THE COURT: Okay. Okay, thank you.

12 Ladies and gentlemen, that concludes our evening. I
13 appreciate your patience as always. We will be in recess until
14 9:00 a.m. tomorrow with the very, very important instruction I
15 give you each day, not to discuss the case with anybody, not to
16 review media about the case, not to have any contact with
17 anyone associated with the case.

18 Have a nice evening and we'll see you back at 9:00.
19 There is a question. I don't know who anyone is.

20 THE JUROR: Juror number four. Is there any chance
21 the case is proceeding faster than you thought and maybe we
22 could be done earlier than Tuesday?

23 THE COURT: Yes. Let me remind you, tomorrow we are
24 going until 12:00. No, tomorrow is a regular day. Friday we
25 are only going until twelve o'clock.

1 But I think it is fair to say, yes, the case is going
2 along very well in terms of the time, and so your question
3 particularly is, is there a possibility it might end sooner
4 than Tuesday?

5 *THE JUROR:* Yes.

6 *THE COURT:* That is the question?

7 *THE JUROR:* Yes.

8 *THE COURT:* And do counsel think that is a
9 possibility?

10 *MR. FEICHT:* Yes.

11 *MR. LEO:* Yes.

12 *THE COURT:* I think we'll know even more tomorrow.

13 So you want to ask this question -- is this regarding
14 travel plans. What date?

15 *THE JUROR:* If we are done Monday, I can fly out
16 Tuesday.

17 *THE COURT:* I can give you another update tomorrow.
18 Anyone else have scheduling questions?

19 Tomorrow is not a half day, it is a full day, nine
20 o'clock. Feel well, have a good night's sleep and restful
21 evening, see everybody at 9:00 a.m.

22 *(Thereupon, the jury leaves the courtroom.)*

23 *THE COURT:* All right. We are going over a few
24 things. Let me start with this. I am going to hand out to
25 each side -- this relates to the jury instructions, we are

1 going to have to have a jury instruction conference obviously
2 at some point.

3 I have what I am marking, and I will file -- it will
4 be part of the exhibits, but it will be a Court exhibit so it
5 is very clear. Court Exhibit 1 is jury instructions that the
6 Court has put together based on what the Plaintiff and the
7 Defense has already submitted, which already is a matter of
8 record -- not of record, but you have both submitted your jury
9 instructions that are in the court file, so they are already
10 filed in the docket.

11 Court Exhibit 1 is a red lined version of what the
12 Court has done, understanding without a conference, and we will
13 have a conference, but the Court's best effort to try to
14 ascertain how the jury instructions should look in light of
15 what both sides have proposed, and then Court Exhibit 2 is a --
16 the same thing, but a clean version of it.

17 Court exhibit 1 is a red line and Court Exhibit 2 is
18 the clean version.

19 I am going to give each side a copy of Court Exhibit 1
20 and Court Exhibit 2 so you have it. So, if we could give each
21 side -- if I could ask our officer to help.

22 Melanie, this is Court Exhibit 1 and Court Exhibit 2.

23 So, as to the jury instructions, I am going to ask
24 that you all start reviewing them. Again, they are not
25 rulings, everyone will have a chance to be heard. What the

1 Court attempted to do is take what each side has submitted and
2 make a preliminary determination of what the Court believes the
3 jury instruction should look like, but that is without the
4 benefit of argument. So, we will get into it more in our
5 conference, but at least this gives everybody a head start that
6 is on the jury instructions.

7 With respect to tomorrow's lineup, what is tomorrow's
8 lineup from the Defense now that the Plaintiff has rested?

9 MR. FEICHT: We would like time to argue judgment as a
10 matter of law.

11 THE COURT: We will do that, we are not going to do it
12 right now, at least at this very moment, because we want to
13 make sure we are prepared for tomorrow.

14 Let me first ask, is there any objection from the
15 Plaintiff that we defer argument, that Defense made the motion
16 for a judgment as a matter of law, that the Court defer hearing
17 argument on it until we find an appropriate time to do so?

18 Any opposition from the Plaintiff on that?

19 MR. LEO: No, your Honor.

20 THE COURT: Does that satisfy the Defense?

21 MR. FEICHT: As long as we have an opportunity.

22 THE COURT: As far as the lineup.

23 MR. FEICHT: Dr. Tracy by deposition.

24 THE COURT: Your anticipated time for that? You have
25 cut things down, what is your best guess of that?

1 MR. FEICHT: I believe we estimated it based on the
2 narrow designations. I don't have that in front of me.

3 THE COURT: 30 to 60 minutes.

4 MR. FEICHT: Yes, somewhere in there.

5 THE COURT: What after Dr. Tracy by depo?

6 MR. FEICHT: Next, your Honor, we will not be calling
7 Dr. Alperin or Dr. Coltman, next will be Jason Ball.

8 THE COURT: Next Jason Ball. Live?

9 MR. FEICHT: Yes, your Honor. I don't have a copy of
10 that filed updated trial plan. Michael Moats by video
11 deposition next.

12 THE COURT: Moats by video depo.

13 MR. FEICHT: And then William Zoeller --

14 THE COURT: Are you not calling David Williams?

15 MR. FEICHT: No, we are not calling David Williams.

16 THE COURT: Then went to Ball and Moats.

17 MR. FEICHT: Robert Zoeller live, and Thomas Johnson
18 by video deposition.

19 THE COURT: Okay, Johnson video depo.

20 MR. FEICHT: That might fill up the whole day.

21 THE COURT: The very last person is Joann Campbell?

22 MR. FEICHT: Correct.

23 THE COURT: That is live?

24 MR. FEICHT: Yes.

25 THE COURT: Okay, let's talk for a moment. You

1 designated Dr. Tracy's deposition, portions, and has the
2 Plaintiff ever cross designated anything?

3 MR. LEO: I believe so, your Honor. With respect to
4 the designations that have been filed during this trial, they
5 filed an updated and tried to add additional designations after
6 the deadline long passed. We haven't had a chance to respond
7 or file cross designations for any new ones.

8 THE COURT: But you have done it to the original.

9 MR. LEO: Yes, your Honor.

10 THE COURT: I will have you all, since Dr. Tracy's
11 depo is the first thing -- someone from Plaintiff's side is
12 listening?

13 MR. LEO: I am listening.

14 THE COURT: As long as I have one person from each
15 side listening, since Dr. Tracy's deposition is first thing up,
16 there will need to be discussion between counsel to iron that
17 out. I will give you my overall assessment of the four batches
18 of designations that have come through and hopefully this will
19 provide some guidance.

20 It appears as if Defendants first batch of
21 designations goes to May 2nd, and Plaintiff raises incomplete
22 multiple times. Large amounts of the testimony are designated,
23 so it is not clear to the Court what is incomplete about it.

24 And in any event, I know that the Plaintiff has made
25 counter designations, so it would seem that would render any

1 incomplete objection moot.

2 So, on incomplete objections, that should be something
3 you can work out, either Plaintiff ask Defense to include
4 additional portions or just include them in your cross
5 designations. And that seems to be a lot of the nature of the
6 designations in that deposition.

7 I will continue.

8 You know, when counter designations are made it
9 generally suggests, you know, completeness objection, you know,
10 may be rendered moot because you have the opportunity to
11 counter designate which is what you have done.

12 It does appear much of the testimony has to do with
13 Dr. Tracy's failure to grieve.

14 I know he speaks about his courses a little bit, how
15 he taught them, how he had them approved, there were relevancy
16 objections. For example, page 189, lines 17 to 25, and page
17 190, lines 1 and 2, the Court overrules that relevancy
18 objection. Dr. Tracy spoke about an article he wrote on a
19 school computer for an outside blogging type activity. The
20 Court overrules any relevancy objection to that.

21 There is testimony about FAU being concerned about
22 safety. There is an objection that says the limine ruling
23 that -- something regarding the in limine ruling, but it is
24 unclear to the Court what that references.

25 The objection seems to be listed to a very large

1 designation block and it is hard to tell where in the block the
2 in limine objection is addressed. The block appears at the
3 bottom of page three and top of page four at Docket Entry 338.

4 With respect to Defendant's second batch of Tracy
5 designations, going to the designation, there appears to be
6 more testimony about grieving, being advised to grieve, failure
7 to grieve.

8 There is something -- one area that may be a potential
9 cause for problems. We have to take a closer look at it.
10 Maybe you worked it out. Pages 137 to 139, something that the
11 general counsel at FAU said something about the senate meeting
12 and something an official said. So, that would need to be
13 taken a closer look at, and I would think the Court's rulings
14 should provide clarification on the pages.

15 The Court overrules any relevancy objections from page
16 165 to 168 where Tracy is admitting that nobody at FAU ever
17 told him to quit or things of that nature. There is more
18 testimony about failure to grieve and the Court doesn't see how
19 the relevancy or incomplete objection has merit in light of
20 what has come in in the trial and in light of the fact there
21 are counter designations that should take care of any
22 incomplete objection.

23 This deposition appears to have the fewest number of
24 designations.

25 The Defendant's third batch goes to the July 26

1 deposition. Plaintiff raises about ten incomplete objections
2 here. Dr. Tracy is admitting that nobody told him he couldn't
3 blog. Dr. Tracy discusses his views on the policy that is
4 confusing, Dr. Tracy asking for clarification, talking about
5 some of the stuff, that material he disclosed.

6 Each of these objections seems to have an incomplete
7 objection, which would be overruled when counter designations
8 can take care of that. And apparently all of the other
9 objections pertain to withdrawn designations.

10 Defendant's fourth batch goes to the August 16, 2017
11 deposition, almost all of the designations have been withdrawn.

12 Relevance, unfair prejudice, confusion, hearsay raised
13 to a designation on page 45, I believe that should be excluded
14 based on a prior ruling I made on this issue. This testimony
15 goes to Dr. Tracy's personal beliefs about whether shootings
16 really occur, and although the first part is whether he wrote
17 about them, to the extent that there is a remaining part that
18 gets into his personal beliefs, that should be excluded.

19 And that is pretty much what the Court was able to
20 ascertain at this point.

21 So, with that guidance, can counsel work out Dr.
22 Tracy's deposition?

23 *MR. LEO:* Yes, your Honor. We request Defense provide
24 us with a complete list that they do intend to use tomorrow,
25 and we can do that before tomorrow.

1 *MR. CURLEY:* I will do that tomorrow and take the
2 Court's rulings into consideration. Some of it may be relevant
3 to damages which the Court already addressed.

4 I am going to cut, it will be a lot less than it is.

5 *THE COURT:* Okay. I will take a particular look at
6 the areas that the Court thought were problematic in light of
7 the rulings the Court has made and it may be easiest just to
8 remove it, and if there is a strong feeling why it has to
9 remain, that may be one or two items that we need to take up.

10 I understand some of the designations were made before
11 all of the Court's rulings.

12 *MR. LEO:* Your Honor, I wanted to add that given the
13 agreement of the parties when we began, it was consolidated
14 with respect to the testimony. There is a lot of cumulative
15 testimony in these designations. I wanted to bring that to the
16 Court's attention and we would be making an objection to
17 anything that is testified to in court by Dr. Tracy when he was
18 directed and crossed.

19 *THE COURT:* You will have to take that up with the
20 Defense. Once it starts getting read, I shouldn't expect there
21 to be any objections at that point.

22 *MR. FEICHT:* We did that this weekend.

23 *THE COURT:* Hopefully that will all be resolved.

24 I am assuming Jason Ball should go smoothly. Do you
25 need to know about any exhibits, is there anything problematic

1 with Jason Hull?

2 MR. BENZION: We would like to know about the exhibits
3 tending to be used with the live testimony.

4 THE COURT: Does Defense know offhand?

5 MR. FEICHT: Yes, we'll double check.

6 THE COURT: I want to be sure that Defense is aware of
7 counter designations and you work out any objection to counter
8 designations. Plaintiff has to first tell Defense what the new
9 counter designations are.

10 And the Moats video depo, I haven't reached that yet,
11 but it would seem as if you need to work that out before the
12 video is actually presented Do you feel confident you can? If
13 not, you call Zoeller live before Moats' video. The video
14 depos, Moats and Johnson, that needs to be worked out so you
15 can put your video together.

16 MR. FEICHT: That is also included in the updated depo
17 designations at Docket Entry 421.

18 THE COURT: I guess what I ask before we undertake --
19 that was an undertaking of four different depositions, you
20 know, I am going to ask before we start undertaking going
21 through every -- I don't recall how extensive Moats' and
22 Johnson's depositions are. Are the objections extensive?

23 MR. LEO: Yes.

24 THE COURT: You need to try to work them out, and what
25 I would like tomorrow is someone hand me a document that shows

1 me only those pages and lines of Moats and Johnson that aren't
2 resolved, and give me some convenient way, make it easy for me
3 on what is remaining and what are the objections, and while we
4 are going through Tracy and Ball, the Court will do its best.
5 That is what you need to do.

6 *MR. BENZION:* Yes, your Honor.

7 *THE COURT:* Take whatever guidance the Court has given
8 and apply it, so it should be only those that are new issues
9 that have never been argued before, because otherwise the
10 rulings I have already made more likely than not would apply to
11 those depositions. So -- because I suspect we will get to that
12 tomorrow.

13 It doesn't sound like Tracy is going to be long.
14 Jason Ball doesn't look like he is very long at all.

15 So, it has to be worked out.

16 *MR. BENZION:* Yes, your Honor.

17 *THE COURT:* Okay.

18 *MR. FEICHT:* Your Honor, to be clear, as far as
19 Plaintiff's general objections to Thomas Johnson, Michael
20 Moats, Robert Zoeller, their testimony being not relevant, I
21 want to make sure that has been overruled.

22 I don't think we have an order, but we have the
23 Court's ruling, comply and grieve --

24 *THE COURT:* All of my various rulings that talk about
25 the failure to grieve, the Court has said that is relevant.

1 So, those types of objections should go away.

2 So, it should be much more particularized. Those
3 topics that are at issue in terms of relevancy I said weren't
4 the core issues, but I, through all my other rulings, discussed
5 that they were relevant, and certainly it has been testified
6 to.

7 MR. BENZION: That is the point the Plaintiff is going
8 to make, your Honor ruled that they were relevant, but your
9 Honor relegated them to not primary issues in the case, failing
10 to grieve could not have formed the basis for termination. So,
11 each side should be cautioned in presenting too much evidence
12 on these issues --

13 THE COURT: The same ruling applies to both sides, but
14 this is the Defense case now, there can be no cumulative
15 argument, just like I was not going to make cumulative rulings
16 until I heard what the Plaintiff has to say.

17 Even though the Plaintiff has put in certain issues,
18 it is Defense's turn now, no cumulative argument that could be
19 made because it was brought up in Plaintiff's case. If you
20 believe there is too much of something being presented by the
21 Defense you can tell me. It is a cumulative argument, the same
22 rulings go to both sides.

23 All right. We will call it an evening, we'll resume
24 at nine.

25 How are you going to do the Tracy deposition, are you

1 going to have somebody read?

2 MR. CURLEY: It is video.

3 MR. FEICHT: We have Defendant's designations, we have
4 been able to upload the designations, that is a video.

5 THE COURT: You are going to do yours by video and the
6 Plaintiff by reading?

7 MR. BENZION: That is the plan.

8 THE COURT: I will read the deposition instruction,
9 although these span over many different dates, so you are going
10 to be having excerpts from all four depositions.

11 MR. FEICHT: Yes.

12 THE COURT: Okay. It might be helpful to hand the
13 Court tomorrow the dates of all four.

14 When I read them the use of deposition pattern 2.2, it
15 calls for the Court to let them know the dates.

16 MR. FEICHT: I have them right here, if you would like
17 this.

18 THE COURT: Yes, that would be fine.

19 MR. FEICHT: Docket Entry 421.

20 THE COURT: All right. Everybody have a good evening,
21 see you tomorrow.

22 *(Thereupon, the Court was recessed.)*

23 * * *

24

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1 I certify that the foregoing is a correct transcript
2 from the record of proceedings in the above matter.
3

4 Date: December 30, 2017

5 /s/ Pauline A. Stipes, Official Federal Reporter

6 Signature of Court Reporter
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Pauline A. Stipes, Official Federal Reporter

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